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Date 9 June 2010
Our ref FOI 1596/10
Your ref

Dear Mr Jagger,

I refer to your e-mail of 11 May 2010 in which you asked, in relation to a meeting which took place on 1 November 2007, '*information from the meeting about the scheme referred to in Budget Note 66 (12th March 2008)*'.

I am answering under the terms of the Freedom of Information Act 2000 (FOIA).

I can confirm that HMRC holds information falling within the description of your request but it is being withheld because information from this meeting is subject to both the following exemptions:-

- a) Section 35(1)(a)FOIA applies to information held for the formulation or development of Government policy. And
- b) Section 42(1) FOIA to information for which a claim to legal professional privilege (LPP) could be maintained.

These exemptions are qualified so HMRC must decide whether the balance of the public interest favours maintaining the exemption. Using headings I set out below why each exemption applies and the considerations I have taken into account on the issue of public interest. You will see that my conclusion is, for each exemption, that the balance of the public interest does not favour setting aside the exemption to release the information.

1) Section 35(1)(a) FOIA

This exemption applies to information held by a public authority for the formulation or development of Government Policy.

Although there is no definition of Government Policy in the FOIA it does include proposals and discussions around creating legislation. Moreover, the Information Tribunal and the Courts have found that information falling within the scope of the exemption can be found in a wide range of documents from officials' e-mails to submissions to Ministers; it can be purely internal but as long as it was created and held in the course of policy development it will be covered by the exemption. In my view advice and discussion including legal advice instigating legislation are part of the policy development process. For these reasons the section 35(1)(a) exemption applies.

In deciding whether the public interest favours maintaining the exemption I have taken account of a number of factors. I accept that there is a general public interest in disclosure to enable greater transparency. And on the face of it this would make the government more accountable and increase trust. But also take into account that that interest is being met by the debate and scrutiny that will take place as the legislation passes through Parliament.

I also take account that decision making and the policy making process needs to be based on the best advice and full consideration of all the options without fear of premature disclosure. If internal advice was revealed during the decision making process there is a risk there would be a deterrent effect on external experts or stakeholders giving advice. That would not be in the public interest.

For these reasons I conclude that the public interest does not favour setting aside this exemption.

2) Section 42(1) FOIA

This exemption applies to information for which a claim to legal privilege could be maintained. Information in this meeting is covered by advice privilege.

In deciding whether the public interest favours maintaining the exemption I have taken account of a number of factors.

As with the arguments under section 35 there is a public interest in openness and greater transparency which would improve understanding of the law making process.

There is a strong public interest in a person seeking access to legal advice being able to communicate freely with his legal advisers in confidence, and in being able to receive advice from his legal advisers in confidence. The importance of this public interest has been reaffirmed by the House of Lords in *Three Rivers DC v Bank of England* (No. 6) [2005] 1 AC 610. The underlying rationale for having a strong rule against disclosure is that it encourages full and frank exchanges between clients and their legal advisers, which is judicially recognised as being something strongly in the public interest, for a variety of reasons: see e.g. *Three Rivers* (No. 6) esp. at [29] and [34] (Lord Scott), [54]-[55] (Lord Rodger), [61]-[62] (Lady Hale), [106] and [112] (Lord Carswell) and [120] (Lord Brown).

These reasons apply with particular force in relation to legal advice concerning governmental policies, because:-

- (i) it is strongly in the public interest that governmental action should respect the rule of law, which makes it imperative that clear, fully informed and fully reasoned and balanced legal advice should be available to the decision-makers with responsibility for such decisions;
- (ii) if the advice were liable to be put in the public domain, the great pressures of political 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 impact they would have in the public debate in which they would feature, which would directly undermine the point at (i) above.

Furthermore, the public interest in allowing government to have a clear space, immune from exposure to public view, in which it can debate matters internally with candour and free from

the pressures of public political debate, is given recognition in the Act itself (see s. 35), and has also been judicially recognised: see eg *Conway v Rimmer* [1968] AC 910, 952 (Lord Reid); *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, 1112 (Lord Wilberforce), 1121 (Lord Salmon), 1126-1127 (Lord Edmund-Davies), and 1143-1145 (Lord Scarman)

It is also an important factor, which underlies the general rationale for legal professional privilege and its particular application in the case of governmental decisions, that the rule against disclosure should be known to operate with reasonable certainty in advance, since if its application were uncertain and too readily displaced, that would undermine the very public interest in encouraging full and frank exchanges which the rule is supposed to promote. This is a common feature of rules which are designed to promote free exchange of information: see eg *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 334A-D and *A v UK* (2003) 36 EHRR 51 (protection for free speech in Parliament, through clear rules of parliamentary privilege); *R v Mirza* [2004] 1 AC 1118 (protection of free debate in the jury room); *Goodwin v UK* (1996) 22 EHRR 123 (protection of journalists' sources); *R v Derby Magistrates, ex p. B* [1996] 1 AC 487, 508E (strict rule of legal professional privilege, to protect exchanges between clients and lawyers); *R v Chief Constable of the West Midlands Police, ex p. Wiley* [1995] 1 AC 274, 297D-E, and *AG v Blake* [2001] 1 AC 268, 287D-F (strict rule of non-disclosure to encourage informants to provide information).

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. There will generally be good reason not to publish advice which contains such matters (as explained above), but equally a decision to publish only legal advice which contained no caveats etc would raise obvious inferences as to the contents of the advice received in other cases where there had been a refusal to publish the advice. It should be emphasised that nothing in this explanation should be taken as implying anything about the particular contents of the information which you have requested.

For the above reasons I conclude the public interest favours maintaining the exemption.

Conclusion

If you are not happy with this reply you may request a review by writing to HMRC FOI Team, Room 1C/25, 100 Parliament Street London SW1A 2BQ or by e-mail to xxx.xxxxxx@xxxx.xxx.xx. You must request a review within 2 months of the date of this letter. It would assist our review if you set out which aspects of the reply concern you and why you are dissatisfied.

If you are not content with the outcome of an internal review, you may apply directly to the Information Commissioner for a decision. The Information Commissioner will not usually consider a case unless you have exhausted the internal review procedure provided by HMRC. He can be contacted at The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF.

Yours sincerely

John Sharpe