



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2007/0001**  
**ON APPEAL FROM**  
**Information Commissioner's Ref: FS50104994**

**Heard at Procession House, London, EC4**  
**On 1 and 19 October 2007**

**Decision Promulgated**  
**7 November 2007**

**BEFORE**

**CHAIRMAN**

**ANDREW BARTLETT QC**

**and**

**LAY MEMBERS**

**PAUL TAYLOR**  
**ANNE CHAFER**

**Between**

**HM TREASURY**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Representation:**

For the Appellant: Jonathan Swift  
For the Respondent: Timothy Pitt-Payne

## **Decision**

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 29 November 2006.

**Information Tribunal**

**Appeal Number: EA/2007/0001**

**SUBSTITUTED DECISION NOTICE**

**Dated 7 November 2007**

**Public authority: HM Treasury**

**Address of Public authority: 1 Horse Guards Road**

**London SW1A 2HQ**

**Name of Complainant: Alex Neil MSP**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the substituted decision is that HM Treasury release the extracts withheld following the Commissioner's decision subject to the redaction defined in the closed and confidential annex to the Tribunal's decision.

**Action Required**

HM Treasury shall release the information to the extent defined above within 28 days from the date of this decision.

Dated this 7th day of November 2007

Signed

Andrew Bartlett QC

Deputy Chairman, Information Tribunal

## **Reasons for Decision**

### Introduction

1. This appeal is concerned with whether Her Majesty's Treasury ("HMT" or "the Treasury") should disclose information consisting of the content of certain budget submissions made to the Chancellor of the Exchequer in the lead up to the 1999 Budget.
2. HMT relies on the exemption contained in s35(1)(a) of the Freedom of Information Act 2000 ("FOIA" or "the Act"), which exempts information held by a government department if it relates to the formulation or development of government policy. The exemption is qualified, that is, it applies where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: see FOIA s2(2)(b).
3. There is also an issue concerning whether HMT fulfilled its duty under s16 of the Act to provide advice and assistance.

### The request for information

4. On 24 February 2005 Mr Alex Neil MSP requested from HMT "all the relevant papers relating to the decision to reduce income tax by one pence<sup>1</sup> in the pound announced in the budget in 1999". The request asked for "all relevant documentation covering the decision in principle, timing of implementation, economic impact, etc".
5. On 3 October 2005 HMT sent an undated letter to Mr Neil, refusing to give the information sought, in reliance on s35(1)(a) of the Act. HMT stated that in its view the public interest in withholding disclosure outweighed the public interest in disclosure, and continued:

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<sup>1</sup> *Sic*; Mr Neil meant 'one penny'.

*“The Treasury already makes a great deal of information publicly available, and we recognize that there is a strong public interest in being open about policy development. It is important that officials are able to test and explore policy options thoroughly to allow policy decisions to be made. We have concluded that to make public such discussions of policy development would, or would be likely, to inhibit full and frank exchanges of views and advice by officials engaged in policy development. This would have a detrimental effect to Treasury policy making and would weaken the Government’s policy position.”*

6. The letter contained an apology for the delayed response, but gave no reason for the delay.
7. The Act requires a response to the applicant within 20 working days (see sections 10 and 17). HMT took over seven months to respond. We infer, therefore, that the response that was ultimately sent was the result of a very careful consideration of the balance of public interest. As a result we approach with some caution matters now put forward by HMT as justifying the refusal, which were not foreshadowed in some way in the refusal letter.

#### The complaint to the Information Commissioner

8. On 2 November 2005 Mr Neil complained to the Commissioner.
9. The slowness with which HMT dealt with the original request was mirrored by an equal slowness in dealing with the Commissioner’s inquiries, with the result that on 8 June 2006 the Commissioner issued an Information Notice under FOIA s51 requiring HMT to respond. By coincidence a response was sent by HMT to the Commissioner on the same date.
10. After investigation the Commissioner concluded in his Decision Notice dated 29 November 2006:
  - (1) HMT had failed to respond to the request within the timescales provided by the Act.
  - (2) HMT had failed to provide appropriate advice and assistance under s16 of the Act.

(3) Because in 1999 responsibility for tax policy lay with the Inland Revenue, HMT held only very limited information falling within the scope of the request.

(4) HMT was correct to regard the requested information as falling within s35(1)(a) of the Act.

(5) However, HMT was wrong to conclude that the public interest in maintaining the exemption outweighed the public interest in disclosure. In reaching this conclusion, the Commissioner referred to a range of considerations which we will address below as necessary.

11. The Commissioner required HMT to release the information which it held. This consisted of extracts from four documents, which had been supplied by HMT to the Commissioner in confidence, and had been identified as being the information that HMT held falling within the scope of the request. The documents were budget submissions to the Chancellor, prepared in advance of the 1999 Budget.

12. On or about 3 January 2007 HMT released the greater part of the information in compliance with the Commissioner's decision. The information that was withheld comprised two passages which were omitted from one of the submissions to the Chancellor.

#### The appeal to the Tribunal

13. HMT commenced an appeal against the Commissioner's decision on 22 December 2006. The appeal was originally against the whole of the Commissioner's decision.

14. We cannot provide in a few sentences a comprehensive summary of the original grounds of appeal, which ran to 52 paragraphs, but we think it fair to identify the central points as being:

(1) The Budget is a matter of great importance to the economy and to the lives and livelihoods of the individuals and corporations who live and operate in the UK.

(2) If the information requested were disclosed, the inevitable results would be-

(a) that officials would feel inhibited in the advice offered to Ministers, in the range of policy options presented, and in the free and frank discussion of the implications of those options, all of which are of special importance in this context,

(b) that officials' and Ministers' confidence in the long-established, well-known and absolute confidentiality of the Budget process would be damaged,

(c) that advice would be less well documented in future,

(d) that good working relationships between Ministers and civil servants would be jeopardised.

(3) The consequence of the above would be serious damage to the policy formulation and decision-making process with respect to the Budget.

15. Further important points that were relied on included the irrelevance of the age of the information (given that Budget options have to be considered every year), the relative weakness of the public interest factors in favour of disclosure, the fact that the information included options which were not adopted, and the settled nature of the Treasury ministerial team (such that the information might reveal the current thinking of Treasury ministers as at the time of the request).

16. We have referred above to the fact that in early January 2007 HMT released the greater part of the information in compliance with the Commissioner's decision. We commend HMT for reconsidering its position upon full review of the Commissioner's reasoning. The fact of such reconsideration counts as a positive factor in our assessment of HMT's current position. At the same time we cannot wholly ignore the credibility problem which HMT has created for itself by asserting the risk of dire detriments in its refusal letter and in its grounds of appeal, only to accept, on reconsideration, that the prospect of the dire results which were so much feared did not after all justify withholding of the bulk of the information sought.

17. Following the release of most of the information, amended Grounds of Appeal were submitted on 4 May 2007. These criticised the Commissioner's reasoning in the

Decision Notice and developed some general propositions concerning the importance and sensitivity of the Budget policy process and the risk of damaging it if the information were disclosed. As an 'open' document, the amended Grounds were not expressed by reference to the substance of the undisclosed information.

18. The appeal is concerned with whether the information withheld should be released. HMT also challenges the Commissioner's finding that HMT failed to comply with its duty to provide advice and assistance under s16.

19. Mr Neil did not take up the opportunity to be joined to the appeal as an additional party. The Tribunal made an order which allowed him to make written submissions if he wished, but he chose not to do so.

#### The questions for the Tribunal

20. Our task is to determine, as required by FOIA s58 (1) (a), whether the Decision Notice was in accordance with the law. We have power to review any finding of fact on which the Notice was based: s58 (2).

21. It is common ground between the parties that the information withheld is of a character that falls within the exemption contained in s35(1)(a). The principal question for the Tribunal is concerned with the application of s2(2)(b): whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

22. We observe that the exemption in s35(1) (a) applies to a defined class of information. Whether the exemption is engaged is not dependent upon any finding that its disclosure may have prejudicial effects. Consideration of the possible effects of disclosure forms part of the exercise required under s2(2)(b) of weighing the balance of public interest.

23. The secondary question in the appeal is whether HMT complied with its duty of advice and assistance under s16 of the Act.

#### The nature of the withheld information



24. The disputed extracts were from a document described in HMT's open skeleton as a budget submission to the Chancellor originating from the Inland Revenue. The first disputed extract we will call 'paragraph 5' and the second 'paragraphs 9-12'. Our description of the contents of the extracts in this our open Decision is necessarily somewhat imprecise, since, if we allow the appeal, the information must not be disclosed and, if we dismiss the appeal, HMT must not be effectively deprived of its right of appeal on a point of law to the High Court by the publication of the information before the expiry of the time for appeal.
25. The withheld text of paragraph 5 contains comments on options for alterations in the taxation of income. One of these options was implemented in the 1999 budget; the other was not. Paragraphs 9-12 contain further comments on options for the timing of certain possible changes to the taxation of income, coupled with information on the costs over three successive tax years of introducing certain options at stated times. Again, some of the changes discussed were made, and others were not.

### Evidence

26. We received evidence from Mr Mark Neale, a senior civil servant, presently Managing Director of the Budget, Tax and Welfare Directorate of HMT. He has worked at HMT in that capacity since December 2005. He previously worked in a different part of HMT from 1995 to 1998. The bulk of his evidence, both written and oral, was given in public. In order to conduct the proceedings without revealing the withheld information and in order to protect the public interest in maintaining the confidentiality of related information prior to the determination of the appeal we permitted some of his evidence to be given in closed session. On the second day of the hearing of the appeal we admitted a further closed statement by him, which dealt with queries that had arisen on the first day. In the event not all the evidence given in closed session was confidential in nature, since it referred to general considerations in addition to the specifics of the withheld information.
27. Mr Neale was cross-examined by Mr Pitt-Payne on behalf of the Commissioner, and re-examined by Mr Swift on behalf of HMT. Mr Swift urged on us that, because the Commissioner called no witness, the evidence was 'all one way', albeit he

expressly conceded that we were not bound necessarily to accept what Mr Neale said and had to assess his evidence. Mr Pitt-Payne countered by observing that the more controversial parts of Mr Neale's evidence consisted of speculation as to the possible effects of disclosure, and that in relation to some of the areas of speculation he was in no better position than anyone else to foresee what might occur.

28. We set out here a summary of the material background facts, before addressing the matters of controversy.

29. *The role of the Treasury* HMT is the UK's finance and economic Ministry. Its function is to ensure sound public finances and promote economic growth. The Budget, Tax and Welfare Directorate (known as BTW) is one part of HMT. It coordinates delivery of the Pre-Budget Report (known as PBR) and the Budget.

30. The PBR is delivered each year in the autumn. It is designed to set out the preliminary forecasts on the economy ahead of the Budget, and is an opportunity in some instances to expose for consultation measures that the government may be minded to announce in the following Budget. The Budget itself is in the spring, usually in March or April. It sets out the government's plans for fiscal policy in the year ahead and announces the government's proposed changes to the tax system to finance its public spending plans. Where the government announces tax changes in the Budget they are then carried into law in the Finance Bill, which is generally introduced shortly after the Budget in April and enacted before the summer recess. Any particular Budget may well foreshadow longer term changes and initiate consultations, and those may then be carried through by way of a consultation paper, or the production of draft clauses for the next Finance Bill. Some of that sort of work might then be further developed at PBR the following autumn.

31. *The Budget process* In order to prepare for a Budget BTW will seek an early 'general steer' from the Chancellor of the Exchequer on his strategic objectives, both on his judgment about the fiscal stance needed to maintain adherence to the fiscal rules (ie, tightening up or loosening fiscal policy, and by how much) and on his emerging thinking about any reforms in the tax and welfare system. All budget decisions are taken in the light of forecasts of the economy and the public finances.

32. The steer given by a Chancellor at the outset tends to be strategic in nature. The ideas on how to achieve the strategy are generated within the BTW team, who will offer a Chancellor a range of options. In light of the steer given, BTW works up a range of possible Budget measures, with an analysis of their costs or alternatively the extra revenue they would raise, of their distributional consequences, and, where relevant, of their likely impact on business investment or on the environment. The distributional analyses will indicate the impacts of a tax change on the disposable incomes of people at different levels of income. They may also highlight fiscal or policy effects of a change that will need to be offset by further change elsewhere within the fiscal framework, either to ensure that the Budget remains in balance or to achieve the Chancellor's overall policy priorities. The proposals are then refined in discussion with the Chancellor, with other Treasury Ministers and with the Chancellor's special advisers. In the process of refinement, some proposals will be dropped, some modified, some adopted.
33. The details of this process will vary according to the steer given and the matters being developed, but there are some issues on which Civil Servants will always offer advice, such as the rates and structures of the main revenue raisers, for example, Income Tax and National Insurance, VAT and corporation tax, since it would be expected that all the main taxes would be reviewed as part of the Budget process. Ideas on how the rates and structures could be altered in the circumstances then prevailing will be put forward by Civil Servants to ensure that the Chancellor is aware of the extent of available options. Sometimes 'left-field' options may be raised by officials, in order to stimulate deeper thinking and debate during the formulation of policy.
34. Many tax measures are market sensitive, and can have a behavioural impact. Foreknowledge of Budget measures would enable people to make advance arrangements which would cost the Exchequer money ("forestalling behaviour"). For example, if people knew that tax on tobacco was about to be raised, they would buy in more in order to avoid the increased tax.
35. Mr Neale gave evidence that the confidentiality of the Budget process was "long-established, well known, and absolute". This was an over-statement. What we think he meant was that, in the period leading up to a Budget, there must be no

inadvertent or malicious leaks, and, subject to the effect of FOIA, the only information given to the public about possible or likely measures must be information that the Government deliberately chooses to disclose, whether in the PBR or elsewhere.

36. The Budget is a matter of national importance, and the policy-making process that leads to the Budget is a particularly important example of a process protected by the qualified exemption in FOIA s35(1)(a).

37. *The publication of Budget-related information and the public interest* HMT

recognises the importance of appropriate publication of information related to the Budget. The Government's Code for Fiscal Stability was laid before Parliament in 1998, pursuant to Finance Act 1998 s155. It laid down general principles of transparency, stability, responsibility, fairness, and efficiency for the conduct of fiscal and debt management policy. The principle of transparency requires the Government to publish sufficient information to allow the public to scrutinise the conduct of fiscal policy and the state of the public finances, and not to withhold information unless it falls within certain exceptions, including that it would harm the integrity of the decision-making and policy advice processes in Government. Before FOIA came into force information was published under this principle.

38. HMT publishes a large quantity of information at and after Budget time to facilitate debate and explain the decisions taken. This includes the detailed Budget Report (or 'Red Book'), and numerous press releases each dealing with particular aspects of the Budget. These provide information on changes made, the reasoning behind those changes and the effect of them, as well as additional notes providing examples and explaining how figures are arrived at. At the time of Budget 1999 the Inland Revenue also published something called the Budget Illustrative Tables, showing the effects of changes in tax on various types of households.

39. HMT does not take the view that no Budget information can ever be disclosed without causing irreparable damage: disclosure under FOIA does not invariably have a chilling effect on the policy making process. Nor does HMT consider that there is any hard and fast rule about the time which should elapse before Budget information is disclosed. Mr Neale suggested that there was a range of criteria

relevant in weighing the public interest in disclosure against the potential harm. He referred in particular to the following-

(1) Whether the information requested bears on a Budget or PBR announcement, or on options considered but not taken forward.

(2) Where the information requested includes options not proceeded with, whether the options concerned remain “live” from the point of view of continuing consideration of tax and welfare policy in future Budgets and PBRs or can be regarded as “dead” because a change of administration renders them politically unacceptable or because they have been clearly superseded by changes in tax policy or law.

(3) Where an issue remains “live”, what the risks of economic damage through forestalling behaviour, or prejudice to the Budget/PBR process through premature disclosure, would be likely to be.

We accept that these are relevant matters for consideration in weighing the balance of public interest. What, if any, weight they carry in a particular case will depend upon the particular information and circumstances.

40. *The change in income tax in the 1999 Budget* Income tax is levied on earnings, savings and dividend income. The structure of income tax involves a personal allowance, which is not taxed, and above the personal allowance there are bands of income taxed at different rates. Before 1999 income from earnings was taxed in three bands of 20%, 23% and 40% (known as starting, basic and higher rates) and income from savings was taxed in two bands of 20% and 40%.

41. The change in 1999, to which the information request in this case relates, was the prospective reduction of the basic rate of income tax on earnings from 23% to 22%. This was part of a range of measures. The 1999 Budget announced that the starting rate on earnings would be halved to 10% to be introduced immediately, meaning a 10/23/40% rate structure for earnings from April 1999. This new starting rate band would also apply to savings income, resulting in a 10/20/40% rate structure for savings from April 1999. The basic rate on earnings would be reduced from 23% to 22% twelve months later, meaning a 10/22/40% rate structure for earnings from

April 2000. The usual range of information in relation to these changes was published in the Red Book and in press releases.

42. At the time, the Inland Revenue had a larger role in the development of tax policy for the Budget, now discharged by HMT. According to Mr Neale the Revenue would have approached the task in very much the same way as HMT does now.

43. *The nature of the information disclosed pursuant to the Commissioner's Decision*

The information disclosed pursuant to the Commissioner's Decision has been placed on HMT's website at [www.hm-treasury.gov.uk/about/information/foi\\_disclosures/2007/foi\\_incometax\\_2007.cfm](http://www.hm-treasury.gov.uk/about/information/foi_disclosures/2007/foi_incometax_2007.cfm)

44. It includes advice to the Chancellor on the advantages of implementing the 1p cut in basic rate from April 2000 rather than April 1999. The gist was that the shorter timescale would be more difficult and would close off some of the options on taxation of savings. There would also be complex consequential changes to consider, including changes to the tax rate applicable to trusts and the rate of tax deducted from construction industry sub-contractors.

45. *The sensitivity of the withheld information* Mr Neale said the difference between the disclosed information and the withheld information was that the former was concerned with whether the Inland Revenue could deliver the proposed changes, to the timetable that the Chancellor had in mind, whereas the latter was about other options for structuring personal tax. His concerns were essentially that disclosure would involve a risk of damaging (1) the integrity of the Budget process and (2) the economic interests of the UK.

46. As regards the integrity of the Budget process, Mr Neale's principal point was that the withheld information did not bear on the Budget announcement, but related to options for alterations to income tax that were not proceeded with. These options were produced mid-way through the process of refining Budget options on personal tax, and before a decision was taken as to what the tax changes would be in the 1999 Budget. He was concerned that if rejected options were revealed, this could lead to Ministers being put under political pressure to rule out such options for the future, and this could narrow the range of options for consideration. It could also lead Ministers to restrict the range of options on which they asked for advice, which

would reduce the quality and depth of the decision-making process. He said he did not accept that the passage of time of itself made any difference to the disclosability of rejected options, because such options would generally be reconsidered year on year as part of the Budget process, notwithstanding alterations in economic conditions. He said the key factor was the degree to which an option remained live and sensitive. He stated in answer to a question from the Tribunal that since FOIA came into force he had not seen a reduction in or narrowing of options on PBR or budget matters, but that he would be concerned if options not proceeded with were released.

47. He was also concerned that policy options put up for discussion in 1999 might be taken as an indication of the thinking of particular Ministers, who were still in post in 2005. This was because the Press might misreport the matter and draw the conclusion, notwithstanding that the options were put up by Civil Servants for consideration, that they represented ministerial thinking.

48. He conceded in cross-examination that as at 2005 anyone who was seeking to draw conclusions about how ministers were likely to behave in the future could look at their track record of actual decisions over some eight years.

49. A further aspect which he developed in his evidence, particularly in his second statement, was a suggestion that it would be unhelpful to disclose pre-Budget policy advice from Civil Servants because, whether a putative measure was adopted or rejected, the public might wrongly assume that it was adopted or rejected by reason of the rationale used by the Civil Servant simply as a working assumption for the provision of advice, whereas the Minister's actual reason for adopting or rejecting it might be different. Moreover, if Civil Servants' advice could routinely be used as a basis for criticism of Ministers, Ministers would be wary of asking for it.

50. He accordingly feared that the confidential relationship between Ministers and Civil Servants could be damaged, and that the Civil Service would be less able to proffer comprehensive, objective and robust information and advice.

51. We did not understand Mr Neale's concern to be the protection of elected politicians from criticism. If that were his concern, we would not share it: see in a different context *Department for Education and Skills v Information Commissioner*

*EA/2006/0006* at paragraph 75(iii). We understood his concern to be, rather, that Ministers' future conduct could be affected in a way which would narrow the range of options on which advice was received and would accordingly be detrimental to good policy-making. Our assessment of Mr Neale's evidence on the risk of damaging the integrity of the Budget process appears below, as part of our analysis.

52. In relation to the UK's economic interests, he explained that HMT regularly considered budget measures in terms of their likely impact on the behaviour and perceptions of inward investors. HMT met businesses and had an understanding of how they arrived at their decisions, including their interest not only in current arrangement but in trends for the future. He was concerned about a risk that disclosure could lead to incorrect conclusions about Ministers' thinking, which could damage inward investment.

53. We found this part of his evidence unconvincing. HMT's refusal letter, sent on 3 October 2005, contained no suggestion of adverse economic impact if the information were disclosed. HMT has not sought to rely on FOIA s29 (prejudice to the economic interests of the UK). The proposition that inward investors in 2005 and onwards would be deterred by the fact that in 1999 certain options for personal taxation, which were not adopted by the Chancellor, were put up by Civil Servants for consideration appears to have been a late afterthought. In our judgment it is fanciful.

54. The Commissioner called no live evidence. In support of the public interest considerations favouring disclosure, he relied on the material in his Decision Notice, and on general argument by reference to the circumstances of the case and other Tribunal decisions.

#### Legal submissions and analysis: Disclosure

55. We heard the parties' submissions in closed session on the second day of the hearing. Our discussion of their submissions in this open decision is necessarily limited. A closed annex to this decision, available to HMT and the Commissioner only, contains some further discussion. A redacted version may be published if there is no appeal from our decision to the High Court. The parties' submissions



were lengthy and were not divided between open and closed matters. We have therefore found it convenient to address the gist of the submissions within our analysis rather than listing them out.

56. The Commissioner in his Decision Notice referred to the withheld information as concerning the practicalities of the implementation of the changes to the tax regime which was subsequently announced rather than the principles involved (and stated that, had the matters covered been ones of principle, he would have found it easier to accept that disclosure might make officials less likely to express their views frankly). Mr Swift criticised this as simply wrong, and submitted that it undermined the Commissioner's reasoning and conclusion. In our judgment the criticism has some justification. While the first document began with the words "You asked for advice on the practicalities of bringing in a 10p top rate band from 6 April 1999, with or without a cut in the basic rate at the same time", nevertheless the comments made in the document ranged further, with remarks on what was desirable, as well as what was practicable. However, we do not attribute to this point the same degree of significance which Mr Swift gave it, since the main thrust of the document was practical, as the Commissioner noted, and the evaluative remarks were few and brief. Moreover, because most of the information was released after the Commissioner's decision, our focus has to be upon a much smaller quantity of information, which the Decision Notice (unavoidably in the circumstances) did not address separately from the information as a whole.

57. Before weighing the balance of public interest we observe, as preliminaries, that-

(1) The assumption underlying the Act is that the disclosure of information held by public authorities is in itself of value and in the public interest. See *Guardian Newspapers Ltd v Information Commissioner EA/2006/0011 and 0013*, paragraphs 82-86. Mr Swift submitted that the only relevant assumption in the Act was that information protected by a qualified exemption would be disclosed unless the public interest in maintaining the exemption outweighed the public interest in disclosure, and that this went nowhere, being a mere re-statement of the issue which the Tribunal had to decide. We do not agree, since this narrow statement of the position ignores the overall policy objective of the Act, which

was to change the relationship between government and the public, by introducing a statutory right to government information.

(2) The s35(1)(a) exemption is qualified. Parliament has therefore recognised the possibility that the balance of public interest may favour disclosure of information relating to the formulation or development of government policy.

(3) The fact that the exemption is qualified means that no Civil Servant or Minister can expect that all information relating to the formulation or development of government policy will necessarily remain confidential. If the possibility of disclosure has of itself a chilling effect on the giving and receiving of open and frank policy advice, such effect is inherent in the Act.

(4) In considering the factors that militate against disclosure, the primary focus should be on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy.

(5) As was stated by the Tribunal in *Department for Education and Skills v Information Commissioner EA/2006/0006* at paragraph 75(i), the central question in every case under s35(1) is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.

(6) As was further stated by the Tribunal in the same decision at paragraph 75(vii) in relation to senior Civil Servants, “in judging the likely consequences of disclosure on officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions”.

(7) Although the information in issue in this case was generated in 1999, which was before FOIA was passed, the White Paper which led to the Act had been

published in 1997. Both counsel agreed that the fact that the information was generated prior to the Act had no effect on the balance of public interest.

58. We identify the following factors which in our judgment are in favour of disclosure in the public interest in the present case:

(1) Policy formulation and decision-making can be improved by transparency, because it provides an incentive to the participants to ensure that conclusions are reached after consideration of an appropriate range of options, are soundly based on appropriate evidence and on public rather than private interests, and are able to stand up to public scrutiny. As Mr Pitt-Payne put it, disclosure can encourage careful and detailed consideration by Civil Servants and Ministers so that, if information is released pursuant to an FOI request, they will not be embarrassed.

(2) In the particular context of fiscal policy, as the Treasury stated in its refusal letter, “there is a strong public interest in being open about policy development”. This is further recognised, subject to qualifications, in the Code for Fiscal Stability.

(3) While the Budget process in general terms is well publicised and well understood, there is value in the public having information illustrating the workings of the process in particular instances.

(4) The particular information in this case may help inform the public’s understanding of the issues that arose in relation to the 1p change in basic rate, both in regard to the substance of change and in regard to the process of making it. We recognise, however, in deference to Mr Swift’s submission, that the quantity of information now at issue here is small, and that its usefulness to the public will accordingly be modest.

(5) Disclosure of the range of options considered would enable the public to promote a public debate and lobby in favour of options not taken up, if they think they are a good idea. Such debate could itself inform future policy-making.

(6) The fact that HMT has placed a substantial quantity of information in the public domain in regard to the change in the basic rate of tax, in the Red Book and elsewhere, does not mean that there is no value in the disclosure of further information. In the case of voluntary publication, both the content and the timing of the disclosure are wholly within the control of Government. That is not the case when an FOI request is made. When information is disclosed pursuant to an FOI request, that enables the public to make a comparison with the information published voluntarily. This provides an incentive to proper conduct and proper decision-making. It is, or should be, conducive to public confidence in the processes of Government.

(7) In broad terms the age of the information makes it easier for it to be disclosed without impinging unduly on the safe space that is required during policy development. Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within Government. But the older the information is, the less sensitive it is likely to be, as an indication of the Government's current thinking. Contrary to Mr Swift's submission and Mr Neale's evidence, we consider that the age factor is a relevant consideration in the present case, notwithstanding the iterative nature of the Budget process year on year. As Mr Pitt-Payne submitted, Treasury discussion of policy options is not seamless or continuing, but at most intermittent. While the possible annual reiteration of policy options affects the weight of the age factor in respect of certain elements of the information, it does not wholly negate it. Moreover, if disclosure is made of an option as something that was considered in 1999, the public will know only that it was considered in that year. This does not involve revealing whether it was considered either by officials or by Ministers in any subsequent year or, if it was, what was said about it. (While that could be the subject of a further FOI request, any such further request would have to be considered on its own merits.)

(8) Disclosure of the withheld information is unlikely to lead to false conclusions about the thinking of the Chancellor. As at 2005, the Chancellor had a long track record of the conduct of the public finances, against which the possible

impact of inferences about his thinking, based on options put up by officials in 1999 and not adopted by him, must be very small indeed. Similarly, it appears to us very unlikely that disclosure would lead to false conclusions about the thinking of the Paymaster-General. Accordingly we do not accept Mr Neale's evidence that policy options put up for discussion in 1999 might be taken as an indication of the thinking of particular Ministers, who were still in post in 2005.

(9) Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process. Contrary to Mr Swift's submissions, in our view it is therefore not an objection that many of the factors which we have listed above are broad-ranging and operate at a relatively high level of abstraction.

59. Mr Pitt-Payne also submitted that, because of the focus of the document on practicalities, there was a lack of specificity in it about the merits of the unadopted options and the details of how they might be structured, and that this was a factor in favour of disclosure. We do not accept that submission. While the lack of specificity reduces the risk of harm if the information is disclosed, it also correspondingly reduces the public interest in disclosing it. We therefore regard this feature as neutral in its effect.

60. We identify the following public interest factors in favour of maintaining the exemption:

(1) The very existence of the exemption indicates a need for caution, and is an acknowledgment of the desirability of a 'safe space' for policy formulation and development. In this case, particular caution is needed because of the high public importance and sensitivity of the Budget process. There is a significant public interest in ensuring that Budget decisions are made carefully after a full and proper process of consideration, and therefore a corresponding interest in taking care to avoid significant damage to the integrity of the policy process.

(2) There need to be weighty reasons for public disclosure if the confidence attaching to formulation of taxation policy for the Budget is to be invaded. In this

case, the specific usefulness of the information to the public will be modest, as acknowledged in factor (4) above.

(3) The withheld information related in part to options that were not proceeded with. This calls for an assessment of the particular risks which Mr Neale was concerned about in the case of options that were not adopted. If the risks should properly be regarded as serious, this would weigh heavily against disclosure. In relation to one element within the withheld information, we consider that (approaching the matter as at 2005, when the request was considered) there was a significant risk of damage to the policy process if it was disclosed. This is explained in the closed confidential annex to this decision. In regard to the remaining elements, we were unpersuaded by Mr Neale's assessment of the potential dangers.

61. Mr Neale asserted, and Mr Swift submitted, that, if rejected options were revealed, this could lead to Ministers being put under political pressure to rule out such options for the future, and this could narrow the range of options for consideration. It could also lead Ministers to restrict the range of options on which they asked for advice, which would reduce the quality and depth of the decision-making process. We were not overly impressed with the concern about political pressure to rule out options. In most circumstances Ministers are adept at keeping options open. We had slightly more concern over the risk that too ready disclosure of policy advice covering unadopted options, some of which might be of considerable sensitivity, might encourage Ministers to seek advice on only a restricted range of options, thereby reducing the quality of the policy formulation process. Hence our acceptance of a risk of detriment if one particular element of the withheld information were disclosed in this case.

62. We were wholly unpersuaded by Mr Neale's further point, that the public might wrongly assume that a measure was adopted or rejected by reason of the rationale used by the Civil Servant as a working assumption for the provision of advice, whereas the Minister's actual reason for adopting or rejecting it might be different, and that this would lead to difficulties. Any Minister in that position would be able to explain the status of the official's assumption and what his own thinking was.

63. We were also unpersuaded by the submission, based on Mr Neale's evidence, that, if Civil Servants' advice could routinely be used as a basis for criticism of Ministers, Ministers would be wary of asking for it. No one has suggested that disclosure of officials' policy advice should be routine. Such disclosure will only be made after consideration of the balance of public interest.
64. In light of the above analysis, weighing the respective public interests in disclosure or in maintaining the exemption, our judgment is that the public interest in disclosure is stronger, except in relation to one element of the information. In relation to that element, we consider the risk to the process of proper formulation of policy to be sufficient (viewed as at 2005) to justify maintaining the exemption and to outweigh the public interest in disclosure. Our reasons for distinguishing between that element of the information and the remainder of the withheld information are contained in the closed and confidential annex. Accordingly, applying the test in FOIA s2(2)(b), the whole of the withheld information must be released, except the one element which we have identified in the confidential annex.

#### Advice and assistance

65. The Commissioner found at paragraph 41 of his Decision Notice

*[finding A] there was a failure ... to provide appropriate advice and assistance to the complainant. The Commissioner also found [finding B] that the refusal notice given to the complainant was less helpful than he would hope is generally the case, although he notes that in this instance the complainant does not appear to have been disadvantaged as a result.*

66. These findings, which we have labelled A and B, were based on the reasoning set out at paragraphs 23-27 of the Decision Notice.

67. Those paragraphs covered two matters. The first was that, in breach of the Code of Practice, HMT neither assisted Mr Neil to make a fresh request to the authority which would have held most of the information (the Inland Revenue) nor transferred the request on his behalf. As we read the Decision Notice, this first matter led to finding A. The second matter was that the refusal notice, while stating that HMT already made a great deal of information publicly available, did not point Mr Neil to

any particular information relating to the decision to reduce the basic rate of income tax. This second matter was the subject of finding B.

68. The appeal by HMT took issue with finding B.

69. HMT's case was-

(1) by virtue of FOIA s21, the information publicly available was wholly exempt from the duty of disclosure under FOIA s1, because it was reasonably accessible to Mr Neil by accessing the Treasury website,

(2) it was not reasonable to expect HMT to expend disproportionate effort in providing advice and assistance with respect to the obtaining of information which was exempt under s21,

(3) Mr Neil, as an MSP, would have been well aware of, or able easily to ascertain, what information was in the public domain, and did not need the assistance of HMT in being pointed to HMT's website.

70. Mr Swift submitted that the duty of advice and assistance did not require a public authority to act as a research assistant, and that the duty to advise and assist should not be construed as extending to directing people to where information was in the public domain.

71. Mr Pitt-Payne did not dispute that as a general proposition, but submitted that the position was different where the public authority was actually relying, in refusing the request, on the existence of material in the public domain, as HMT did in its refusal letter. In those circumstances it was helpful for the public authority to go further. An applicant could refine his request if he knew what was already available, or could explain why what he was seeking would add to what was in the public domain, or indeed might conclude that he did not need to pursue his request further. We accept this submission.

72. Mr Pitt-Payne further submitted that the authority could not make assumptions about what an applicant did or did not already know. Here we part company with him, not on any point of general application but because of the particular circumstances of the case. The duty under s16 arises in relation to a particular



applicant in particular circumstances, and is conditioned by what it is reasonable to expect the authority to do. We note that when Mr Neil applied to the Commissioner by letter of 2 November 2005, his letter contained no complaint concerning any lack of advice and assistance. In our view it is reasonable to infer that, given his position and the resources available to him as an MSP, he was not in need of assistance in relation to finding the publicly accessible material on the Treasury's website. It would have been good practice for the Treasury to indicate where the public material was to be found, but in these particular circumstances we adjudge that it was not reasonable to expect the Treasury to offer that assistance.

### Conclusion and remedy

73. For the reasons set out above and the further reasons in the confidential annex, in our judgment the Commissioner's Decision Notice was in accordance with the law, save in two respects.

74. First, having heard evidence and reviewed the Commissioner's findings of fact, we differ from the Commissioner on the balance of public interest in regard to one element of the withheld information. With that exception, we uphold the Commissioner's decision as to the release of the information held by the Treasury. In regard to the one element, we consider the risk to the process of proper formulation of policy to be sufficient (viewed as at 2005) to outweigh the public interest in disclosure and to justify maintaining the exemption under FOIA s35(1)(a). The appeal is allowed to that extent. The remainder of the withheld information must be released within 28 days.

75. Second, we allow the appeal against the Commissioner's finding that the Treasury failed in its duty under FOIA s16 by not pointing Mr Neil to any particular information relating to the decision to reduce the basic rate of income tax.

76. The full version of the confidential annex to this decision shall not be published.

77. The redacted version of the confidential annex to this decision may be published after expiry of the time for appeal to the High Court, if such appeal is not made. If such appeal is made, it is not to be published without further permission.

78. Our decision is unanimous.

Signed

Andrew Bartlett QC

Deputy Chairman

Date 7 November 2007