

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 August 2022

**Public Authority:** HM Revenue & Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from HM Revenue & Customs ("HMRC") about ascertaining employment and contract status for tax purposes. HMRC refused to disclose the information, citing section 12(1) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that HMRC has correctly applied section 12(1) of FOIA to the requested information.
3. Therefore the Commissioner requires no steps to be taken by HMRC.

#### **Background to the Request**

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4. HMRC has provided the Commissioner with some background to the request, which the Commissioner has detailed in this decision notice as follows:

##### **Off-Payroll Working**

5. The off-payroll working rules, commonly known as IR35, have been in place for over twenty years and are designed to ensure that individuals working like employees but through their own company, usually a personal service company (PSC), pay broadly the same Income Tax and National Insurance contributions (NICs) as those who are directly employed. To improve compliance with the existing rules the

Government introduced a reform which came into effect in the public sector in April 2017 and in the private and voluntary sectors on 6 April 2021.

6. The reforms move the responsibility for determining whether the off-payroll working rules apply from the individual's company to the client engaging them. To determine if the rules apply, the client must consider whether the engagement constitutes one of employment or self-employment. They must do this with reference to the contractual terms and working arrangement.

### **Employment Status**

7. In order to determine the nature of a contract, it is necessary to apply common law principles, which have been developed over the years as a result of court and tax tribunals cases. The courts have, over the years, laid down some factors and tests that are relevant, such as:
  - Whether the worker has to do the work themselves
  - Whether someone tells them at any time what to do, where to carry out the work or when and how to do it
  - Whether they are paid a set amount by the hour, week, or month or are paid on a commission basis
  - Whether they can hire someone to do the work or engage helpers at their own expense
  - Whether they risk their own money
  - Whether they provide the main items of equipment they need to do their job, not just the small tools that many employees provide for themselves
  - Whether they regularly work for a number of different people
8. However, other factors may also be taken into account when deciding whether someone is employed or self-employed.

### **CEST**

9. As part of the implementation of the reforms in 2017, HMRC developed the Check Employment Status for Tax (CEST) tool, working closely with tax specialists, contractors and other stakeholders. It is available to public sector bodies and businesses to support them to make decision about the employment status of the workers they engaged and apply the off-payroll working rules correctly and has been used over 2 million times between November 2019 and December 2021. It was tested

rigorously against known case law and settled cases, and HMRC stands by its results if the tool is used in accordance with HMRC's guidance. Information regarding the development and testing of the tool has previously been published on GOV.UK.

## **Request and response**

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10. On 15 March 2021 the complainant wrote to HMRC and requested information in the following terms:

"It has been reported by some tax accountants that HMRC have asked them over a hundred questions in order to attempt to ascertain the IR35 status of a single contract arrangement. I note this contrasts heavily with the CEST tool, which asks only 30. It seems therefore that HMRC has additional checks it can perform in order to ascertain the status of a contract that it has not yet published. Please could you supply the list of questions you can ask in such cases (beyond those already asked by CEST). For the avoidance of doubt, I am not asking for any details of any open cases, or for any information which may identify them. I only need the questions you're asking of contractors to determine their IR35 status. If you don't have a list of the exact questions you've previously asked, I'll settle for a list of questions you might ask if the situation requires it."

11. HMRC responded on 15 April 2021 stating that it did not hold the requested information. Following the complainant's request for an internal review, HMRC responded to this on 5 August 2021 and changed its position. It stated that it did not hold previously asked questions in a pre-compiled list, but rather it would have to check for them across a number of sources. It stated that to do so would exceed the cost/time limit as set out in section 12 of FOIA

## **Scope of the case**

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12. The complainant contacted the Commissioner on 5 August 2021 to complain about the way their request for information had been handled.
13. The Commissioner has considered HMRC's handling of the complainant's request, in particular its application of section 12(1) of FOIA to the request.

## Reasons for decision

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### Section 12 – cost of compliance exceeds appropriate limit

14. Section 12 of FOIA states that:

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

15. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004<sup>1</sup> (the Fees Regulations) at £600 for central government public authorities such as HMRC. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that HMRC may refuse to comply with a request for information if it estimates that it will take longer than 24 hours to comply.

16. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that a public authority can only take into account the costs it reasonably expects to incur in:

- (i) determining whether it holds the information;
- (ii) locating the information, or a document containing it;
- (iii) retrieving the information, or a document containing it; and
- (iv) extracting the information, or a document containing it.

17. Section 12 states that public authorities are only required to estimate the cost of compliance with a request, and are not required to give a precise calculation. However, the Commissioner considers that the estimate must be reasonable. The Commissioner follows the approach set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2007/0004, 30 October 2007) which stated that a reasonable estimate is one that is “...sensible, realistic and supported by cogent evidence”.

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<sup>1</sup> <https://www.legislation.gov.uk/uksi/2004/3244/contents/made>

### **The complainant's position**

18. Following the initial response from HMRC, the complainant stated in his request for internal review that he did not accept that the requested information was not held by HMRC and that he did not believe each tax inspector had to "invent" the questions asked in each case. In that request for internal review the complainant also amended his initial request to ask for additional information regarding the questions asked by CEST, to which HMRC provided a link together with a more detailed explanation of the factors considered when determining employment status for tax.
19. The complainant still considers that HMRC must hold a "ready supply" of questions it uses to ascertain the status of a single contract arrangement.

### **HMRC's position**

20. HMRC has informed the Commissioner that it is the case that its officers look at the facts of an engagement that they have access to and use the common law principles established by the Tax Tribunals and produce questions on a case-by-case basis to determine the employment status for tax of the worker. This means that HMRC reviews the terms agreed between the worker and the engager in the written contract and then formulates questions to test the actual working practices of the arrangement against the terms detailed in the contract. HMRC then compares these working practices against the common law principles of employment status which have been determined through a number of decisions by the Tax Tribunals and Courts to arrive at a determination on the worker's Employment Status for Tax.
21. HMRC has further stated that the questions asked by CEST, to which a link was provided to the complainant, aim to compare the workers' circumstances with the employment status principles that have been developed through common law by the Tax Tribunals and the Court of Appeal, and Supreme Court. The questions asked by CEST are similar to those considered by a compliance officer when conducting an enquiry to determine employment status for tax.
22. HMRC explained that initially, it did not consider that the complainant was seeking a compiled list of all questions asked by it in off-payroll compliance work undertaken, but rather that he was seeking a pre-existing list from which questions are selected. It explained that such a document does not exist and cannot be created. In addition, it considered that compiling any such list would require considerable skill and judgment as to determining what questions in some compliance

checks were asked for the specific purpose referred to by the complainant.

23. However, upon clarification from the complainant and as part of considerations at the Internal Review stage, HMRC ascertained that whilst it does not hold the requested information in one list or document, it does hold individual lists contained in the records of each compliance case, which it would have to go through individually in order to compile a list of questions already asked. HMRC therefore went on to consider the cost and time necessary for undertaking such an activity.
24. The complainant has not provided any time limits for the information requested. The off-payroll working rules were introduced in 2000, and HMRC has been conducting compliance activity since then. To produce the information requested by the complainant HMRC would need to identify, review and extract the information from a vast number of compliance enquiry records. Also, a number of records will have been destroyed in accordance with HMRC's data retention policy, which states that such records are to be destroyed 6 years after the compliance check is complete.
25. The majority of case records will be held on HMRC's electronic case management system, which is not intended to operate as a historic database and cannot be used as a search tool for specific information. Each case record will contain a number of 'attached documents' which could range from correspondence with customers, internal case management memos to notes of meetings. As such, there is no easy way to collate a list of questions related to historic off-payroll working compliance cases.
26. When considering whether a new document listing all the questions asked could be compiled, HMRC considered the cost under Section 12 of FOIA. It concluded that to produce a list of questions of the nature requested by the complainant, HMRC would need to identify, review and extract the information from the vast amount of enquiry records held on the system. This would far exceed both the cost limit (£600 for HMRC) and time limit (far in excess of 25 hours). As such, HMRC concluded that undertaking the activities necessary to respond to the complainant's request would greatly exceed the limit as set out in section 12 of FOIA.

### **The Commissioner's position**

27. The Commissioner notes that HMRC has not indicated that it has conducted a sampling exercise in this case. However, given the vast number of records involved, the Commissioner considers that this would not have served any useful purpose in the particular circumstances of this case.
28. The Commissioner considers that HMRC is entitled to rely on section 12 in respect of the complainant's request as it has clearly demonstrated that attempting to compile a list of questions to respond to the complainant's request, with reference to the four activities set out in paragraph 16 above, would far exceed the cost and staff time limits as set out in section 12(1).

### **Section 16 – advice and assistance**

29. Section 16 requires a public authority to provide a requestor with appropriate advice and assistance. HMRC has set out that it provided advice and assistance to the complainant by providing the guidance page which can be used by its caseworkers when conducting a fact-finding/evidence-gathering process as part of a compliance check. This sets out a significant amount of guidance on the employment status factors considered by compliance officers and HMRC considered that this would give the information sought by the complainant with regards to how compliance officers would approach a compliance check.
30. HMRC also provided the complainant with a link to the 37 questions asked by CEST and the potential routes through the tool. The questions asked by CEST aim to compare the worker's circumstances with the employment status principles that have been developed through common law by the Tax Tribunals and the Court of Appeal, and Supreme Court. The questions asked by CEST are similar to those considered by a compliance officer when conducting an enquiry to determine employment status for tax. HMRC also provided the complainant with a more detailed explanation of the factors considered when determining employment status for tax.
31. Given the information detailed above, the Commissioner considers that HMRC has provided the complainant with appropriate advice and assistance as per section 16 of FOIA.

## Right of appeal

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32. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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 .....**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**