

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 23 May 2022

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

Decision (including any steps ordered)

1. The complainant has requested information relating to outcomes of appeals contained in HM Revenue and Customs (HMRC) annual reports.
2. The Commissioner's decision is that HMRC is entitled to rely on section 44(1)(a) FOIA – prohibition on disclosure, to refuse the request.
3. The Commissioner does not require HMRC to take the following any steps as a result of this decision notice.

Request and response

4. On 5 February 2021, the complainant wrote to HMRC and requested information in the following terms:

"Please supply any emails to/from Mary Aiston that include the term 'disguised remuneration for the calendar month of January 2019. This should also provide emails where DR has been used as an abbreviation"
5. HMRC responded on 16 August 2021 and refused to provide the requested information citing section 44(1)(a) as its basis for doing so.
6. Following an internal review HMRC wrote to the complainant on 23 August 2021 and maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 26 August 2021 to complain about the way their request for information had been handled and stated:

HMRC declined to provide a number of sections of data (particularly a series of redactions in a document labelled further attachment of email 46 - attachment 1) page 218-224 of the response. HMRC have quoted sections 44,18 of the FOIA and section 23 of the CRCA so as not to disclose the name of individuals or businesses. The use of the FOIA/CRCA legislation surely does not need to withhold the names of these publicly listed and historical court cases.

8. The Commissioner considers the scope of this investigation to be to determine if HMRC is entitled to rely on section 44(1) FOIA to refuse to provide the requested information.

Background

9. HMRC is a statutory body with statutory functions and a statutory duty of confidentiality which are set out in legislation in the Commissioners for Revenue and Customs Act, (CRCA) 2005.
10. It is the UK's tax, payments and customs authority and its core purpose is to:
- collect the money to fund the UK's public services
 - help families and individuals with targeted financial support and
 - through its customs service facilitate legitimate trade and protect the UK's economic, social and physical security.
11. The duty of confidentiality prohibits HMRC officials (and those acting on behalf of the Commissioners) from disclosing information held by HMRC in connection with its functions. This prohibition applies to all information held by HMRC in connection with its functions and reflects the importance placed on 'taxpayer confidentiality' by Parliament when the Department was created.
12. The effective functioning of the department was felt to depend critically on its customers being able to trust that the information held on them would be appropriately protected and would be disclosed only in controlled, limited circumstances. There is additional protection for information that relates to an individual or legal entity whose identity is

specified in the disclosure or can be deduced from it ('identifying information') in the form of a criminal sanction for wrongful disclosure. HMRC is committed to being as transparent as possible while complying with its statutory duty of confidentiality.

13. It is part of HMRC's functions to publish information that promotes public understanding of its work and increases accountability and public confidence. All information releases consider HMRC's obligation to collect the taxes for which it is responsible and the impact that publication will have on tax collection, including the need to protect sensitive and personal information provided by individual taxpayers in order to encourage openness and promote voluntary compliance.

Reasons for decision

14. The first part of this decision notice details the parts of FOIA and CRCA that have been relied on to withhold the requested information.

Section 44 – Prohibitions on disclosure

15. Section 44 is an absolute exemption. This means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.

16. Section 44 of the FOIA states that:

- (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
 - (a) is prohibited by or under any enactment,
 - (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court

Commissioners for Revenue and Customs Act

17. Section 23 provides:

Freedom of information

(1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 (prohibitions on disclosure) if its disclosure—

- (a) would specify the identity of the person to whom the information relates, or
- (b) would enable the identity of such a person to be deduced.

(1A) Subsections (2) and (3) of section 18 are to be disregarded in determining for the purposes of subsection (1) of this section whether the disclosure of revenue and customs information relating to a person is prohibited by subsection (1) of that section.

(2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.

(3) In subsection (1) 'revenue and customs information relating to a person' has the same meaning as in section 19.

18. Section 23(1) refers to section 18:

Confidentiality

(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.

(2) But subsection (1) does not apply to a disclosure—

(a) which—

(i) is made for the purposes of a function of the Revenue and Customs, and

(ii) does not contravene any restriction imposed by the Commissioners,

(b) which is made in accordance with section 20 or 21,

(c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(e) which is made in pursuance of an order of a court,

(f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,

(g) which is made to the Director General of the Independent Office for Police Conduct, or a person acting on the Director General's behalf, for the purpose of the exercise of a function by virtue of section 28,

(h) which is made with the consent of each person to whom the information relates,

(i) which is made to Revenue Scotland in connection with the collection and management of a devolved tax within the meaning of the Scotland Act 1998,

(j) which is made to the Welsh Revenue Authority in connection with the collection and management of a devolved tax within the meaning of the Government of Wales Act 2006, or

(k) which is made in connection with (or with anything done with a view to) the making or implementation of an agreement referred to in section 64A(1) or (2) of the Scotland Act 1998 (assignment of VAT).

(2A) Information disclosed in reliance on subsection (2)(k) may not be further disclosed without the consent of the Commissioners (which may be general or specific).

(3) Subsection (1) is subject to any other enactment permitting disclosure.

(4) In this section—

...

(c) a reference to a function of the Revenue and Customs is a reference to a function of—

(i) the Commissioners, or

(ii) an officer of Revenue and Customs, ...

19. CRCA sets out a number of functions of the Commissioners and officers of Her Majesty's Revenue and Customs. Section 5(1)(a) will suffice as an example. This provides that 'The Commissioners shall be responsible ... for the collection and management of revenue'.

20. Section 9(1) provides:

Ancillary powers

(1) The Commissioners may do anything which they think-

(a) necessary or expedient in connection with the exercise of their functions, or

(b) incidental or conducive to the exercise of their functions.

And 'function' is defined in section 51(2)(a):

(2) In this Act-

(a) 'function' means any power or duty (including a power or duty that is ancillary to another power or duty), and

(b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred-

(i) by or by virtue of this Act, or

(ii) by or by virtue of any enactment passed or made after the commencement of this Act.

21. In other words, when CRCA refers to functions, that includes powers relevant to those functions.

22. Section 23(3) adopts the definition of 'revenue and customs information relating to a person' from section 19:

Wrongful disclosure

(1) A person commits an offence if he contravenes section 18(1) or (2A) or 20(9) by disclosing revenue and customs information relating to a person whose identity—

(a) is specified in the disclosure, or

(b) can be deduced from it.

(2) In subsection (1) 'revenue and customs information relating to a person' means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others).

Commissioner's analysis

23. Section 18(1) CRCA states: '*Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.*'

24. The Commissioner shares the view that the information is held by HMRC in connection with its function of assessing and collecting tax. Therefore the information falls under section 18(1) CRCA and is prohibited from disclosure.

25. The next matter to consider is whether section 23(1) CRCA is also relevant. Section 23(1) specifically designates as exempt from disclosure under section 44(1)(a) FOIA, if its disclosure would identify the person to whom it relates or would enable the identity of such a person to be deduced. The term "person" includes both natural and legal persons.

26. The complainant has argued that:

"I do not believe that 44(1), 18(1) and 23 are legitimate reasons for refusing to provide emails. Without evidence from HMRC that they are a FUNCTION. The ICO should be fully satisfied that those emails relate specifically to a FUNCTION of HMRC and what proof/evidence has HMRC give to you to determine this?

HMRC have released countless emails on this subject, why were they not withheld using the same reasoning? It can only be because they contain information that would disadvantage the organisation if they were made public."

27. HMRC argued that neither section 23 nor the definition of revenue and customs information relating to a person requires HMRC to make any allowances for information which may already be in the public domain.

28. Section 23 CRCA is expressed in such a way as to be certain that under FOIA, no-one is entitled to information HMRC holds relating to a person. This may on occasion have the effect of catching information that is in the public domain, but that is a proportionate incident to the certainty of taxpayer protection under FOIA that the prohibition seeks to achieve.

29. Were the redacted terms to refer to litigation in which HMRC exercised its statutory functions, and the context in which the party's name is placed would reveal some information about the 'person', the requirements of section 23(1) would still be met and as such the exemption at section 44(1)(a) FOIA would be engaged.

30. In the words used in section 19(2) CRCA, it is held in connection with the exercise of a function of the public authority and from that, the persons to whom the information relates are identifiable. The test it should be noted is not whether the information sought is taxpayer confidential. It is whether the information would specify the identity of a person to whom it relates or would enable their identity to be deduced.

31. On this basis, HMRC maintained that it is entitled to withhold the requested information by virtue of section 44(1)(a) FOIA.

32. The Commissioner has considered the complainant's arguments that the information is not held in 'connection with' a function of HMRC and that

it has previously released emails on this subject. It should be noted that although emails may have previously been disclosed on this subject, it is not the same as disclosing emails relating to litigation involving HMRC and another "person".

33. The Commissioner considers that litigation is clearly a function of HMRC and the emails are held in connection with that function.
34. Therefore the Commissioner finds that HMRC was entitled to withhold the requested information on the basis of section 44(1)(a) FOIA.

Right of appeal

35. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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

Susan Duffy
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