

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 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 disguised remuneration ('DR') schemes.
2. The Commissioner's decision is that HM Revenue and Customs ('HMRC') has correctly withheld the information within part 1 of the request, citing section 44(1)(a) (prohibitions on disclosure) of FOIA.
3. However, the Commissioner has also decided that HMRC has failed to explain how compliance with part 2 of the request would impose a grossly oppressive burden. Therefore, HMRC is not entitled to rely on section 14(1) (vexatious requests) to refuse it.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh refusal notice in relation to part 2 of the request that does not rely upon section 14(1).
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

6. On 18 November 2020, the complainant wrote to HMRC and requested the following information:

“Dear HM Revenue and Customs,

In FOI number (Redacted) dated 2 November 2020:

You have stated in your response to FOI2020/01611 that 13 contractors engaged by HMRC were highly likely to be current or previous users of a DR Scheme. The information below was provided by yourselves for these workers as follows - for ease of reference.

Contractor Start date End date

Contractor A **/**/2017 **/11/2019
 Contractor B **/07/2018 **/11/2019
 Contractor C **/07/2018 **/11/2019
 Contractor D **/07/2018 **/11/2019
 Contractor E **/07/2018 **/06/2019

Contractor Start date End date

Contractor F **/12/2019 **/04/2020
 Contractor G **/12/2019 **/04/2020
 Contractor H **/**/2019 **/04/2020
 Contractor I **/**/2019 **/04/2020
 Contractor J **/**/2018 **/04/2020

Contractor Start date End date

Contractor K **/11/2017 N/A
 Contractor L **/08/2015 N/A

In July 2020, usage of a DR scheme by a further contractor (Contractor M) was identified as part of employment checks and the engagement was terminated within two weeks.

Contractor Start date End date Period of scheme usage

Contractor N **/05/2015 **/02/2017 2011/12 – 2016/17
 Contractor O **/05/2015 **/01/2018 2011/12 – 2017/18
 Contractor P **/01/2016 **/02/2017 2013/14 – 2014/15
 Contractor Q **/10/2016 **/05/2018 2011/12 – 2014/15
 Contractor R **/08/2015 **/11/2019 2011/12 – 2012/13

1. Of those 18 workers listed above please supply the amount of different scheme providers involved. For example – not providing names of said providers but calling them provider AA, provider BB etc. As example below

Contractor	Start date	End date
Provider Contractor A	**/**/2017	**/11/2019
Contractor B	**/07/2018	**/11/2019
Contractor C	**/07/2018	**/11/2019
Contractor D	**/07/2018	**/11/2019
Contractor E	**/07/2018	**/06/2019

2. Of this (xx) number of providers identified by this exercise, how many of these have been subject to further investigation by HMRC, which has subsequently resulted in action being taken to close down their provision of said arrangements? Please provide evidential documentation (with appropriate redaction) to confirm any action which is claimed to have been carried out.”

7. HMRC responded on 21 December 2020 and partly answered the request. HMRC explained to the complainant that ‘your request concerns 15 different scheme providers, all of which have been subject to HMRC compliance activity.’
8. HMRC also confirmed that the request for ‘evidential documentation’ of any further investigation carried out by HMRC had been refused in accordance with section 14(1) (vexatious requests).
9. The complainant was dissatisfied, noting that in relation to part 1 of the request, ‘You have communicated the total number (15) of scheme providers, but have not linked the usage of these schemes to the 18 x individual contractors as requested.’
10. Following an internal review HMRC wrote to the complainant on 24 March 2021 and confirmed that it would not link the scheme provider to the 18 contractors in line with section 44(1)(a). It also confirmed that it would not provide any evidential documentation of any further investigation under section 14(1).

Scope of the case

11. The complainant contacted the Commissioner on 24 May 2021 to complain about the way that their request for information had been handled.
12. The Commissioner considers the scope of his investigation to be to determine if HMRC is correct when it says that to link the scheme

provider with the contractors would identify the individuals involved and is therefore exempt from disclosure in accordance with section 44(1)(a). He will also consider whether HMRC is entitled to refuse to comply with the request for 'evidentiary documentation' under section 14(1).

Reasons for decision

Section 44 – Prohibitions on disclosure

13. Section 44 of 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 retained EU obligation, or
- c. would constitute or be punishable as a contempt of court.”

Is disclosure of the requested information prohibited by or under any enactment?

14. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:

- i. primary legislation (an Act of Parliament); or
- ii. secondary legislation (a Statutory Instrument).

15. By way of background, HMRC is the UK's tax, payments and customs authority. It carries out its duties under the Commissioners for Revenue and Customs Act, (CRCA) 2005¹ and its core purposes are:

- to collect the money to fund the UK's public services
- to 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.

16. Section 18 of the CRCA refers to the duty of confidentiality that all HMRC officials are bound by. It specifies however that such confidentiality only

¹ [Commissioners for Revenue and Customs Act 2005 \(legislation.gov.uk\)](http://legislation.gov.uk)

applies to information held by HMRC for the purposes of fulfilling its core purposes and not information held for administrative purposes.

17. HMRC has explained that the relevant prohibition in this case is section 23(1) of the CRCA which states:

“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.”

18. Firstly, the Commissioner is satisfied that the requested information is held by HMRC in connection with its function of assessing and collecting tax. Therefore the information falls under section 18 of the CRCA and is prohibited from disclosure.

19. The Commissioner must now consider if disclosure would, as section 23(1) of the CRCA states, identify the person to whom the information relates. If this is not the case then section 18 of the CRCA and by extension, section 23(1) of the CRCA and section 44(1)(a) of FOIA cannot be engaged.

20. The Commissioner understands that the term ‘person’ includes both individuals and legal persons such as organisations. The Commissioner has previously upheld HMRC’s position that schemes themselves also will represent legal persons.² Therefore, if compliance with part 1 of the request could identify any of these persons, the information is exempt.

21. HMRC has explained in weighing up the risk of identification, ‘HMRC refers to the ICO’s Anonymisation Code of Practice³ as well as the National Statistician Guidance: Confidentiality of Official Statistics.⁴ As part of assessing identifiability risk, HMRC has considered whether an intruder would be able to achieve identification if they were motivated to attempt it.’ This is what is known as the motivated intruder test and is used by both the Commissioner and the Tribunal.

² [FS50793047](#)

³ [Anonymisation: managing data protection risk code of practice \(ico.org.uk\)](#)

⁴ [Confidentiality-of-Official-Statistics-National-Statisticians-Guidance.pdf \(civilservice.gov.uk\)](#)

22. HMRC has explained that 'The time periods in which the schemes were operating is already known as a result of the previous disclosure providing the dates in which individual contractors were engaged. HMRC considers that this information when combined with specific compliance action could be used by a motivated intruder to identify the schemes themselves.'
23. Ultimately, HMRC is concerned that compliance with this request, and other requests that it has complied with, would allow a motivated intruder to learn the following about the 18 contractors cited in the request:
- “• that they had worked for HMRC as a contractor
 - the mechanism through which they had been engaged
 - the period of time for which they had occupied this role
 - the circumstances surrounding their departure from this role
 - that they had used a tax avoidance scheme
 - that they are subject to ongoing compliance action into their tax affairs
 - the scheme they had used.”
24. HMRC has failed to direct the Commissioner to the other FOI requests that it is referring to. Nevertheless, HMRC has explained that it is not just the information that it has placed into the public domain that could aid a motivated intruder.
25. In April 2019, the Loan Charge All-Party Parliamentary Group (APPG) published a report⁵ and on page 50 it discusses submissions from workers employed for HMRC whilst utilising DR schemes. The APPG published another report⁶ in February 2021 which provided further details.
26. HMRC has explained 'HMRC accepts that disclosure of the information in isolation would not serve to identify individual persons. However, disclosure would likely lead to identification when combined with pre-

⁵ [Microsoft Word - Loan Charge Inquiry Report April 2019 FINAL.docx \(loanchargeappg.co.uk\)](#)

⁶ [Loan-Charge-APPG-report-on-HMRC-use-of-contractors-using-DR-schemes-February-2021-min.pdf \(loanchargeappg.co.uk\)](#)

existing material as well as that requested at the same time. Disclosure of such information may also lead to future requests on this matter. This is sometimes referred to as a 'mosaic' or 'jigsaw' effect.'

The Commissioner's view

27. The Commissioner has studied the information already in the public domain on the 18 contractors in question and the DR schemes. Specifically, the Commissioner has studied the information disclosed in response to the previous FOI request referred to in paragraph 6 and the APPG report.
28. Within the second APPG report there is a submission from a contractor who was employed by HMRC between August 2007 and June 2010. The Commissioner notes that the individuals to whom this request relates were employed by HMRC from 2015 onwards. The Commissioner doubts if any motivated intruder could link the submission within the report to any of the withheld information as it does not appear to be the same individual.
29. However, HMRC has stated 'The information relates to a small number of individuals and schemes, the identities of which could be deduced from information in the public domain by either a motivated intruder, the APPG secretariat, the person themselves or those close to them. HMRC also acknowledges the risk that anonymised evidence provided to the APPG could be published in the future which, when combined with that released under the FOIA would readily identify the persons.'
30. The Commissioner notes the APPG's most recent report states 'The Loan Charge APPG had other such testimonies at the time and has since received several more from contractors who had worked for HMRC.'
31. The Commissioner is mindful that the requested information relates to a relatively small number of schemes and individuals, who, although have not been identified, have been placed under quite intense scrutiny due to their use of DR schemes and subsequent association with HMRC. The Commissioner cannot rule out the possibility that these individuals have provided intelligence to APPG.
32. The Commissioner is also mindful that specific information may be more attractive to motivated intruders such as information that may reveal newsworthy information or information that may be used for political or activist purposes, for example, against a particular individual or organisation. The Commissioner's guidance⁷ explains that 'data with the

⁷ [Anonymisation: managing data protection risk code of practice \(ico.org.uk\)](https://ico.org.uk/Anonymisation-managing-data-protection-risk-code-of-practice)

potential to have a high impact on an individual is most likely to attract a 'motivated intruder'.

33. The complainant has explained that they have no interest in identifying any of the 18 contractors as a result of their request. However, disclosure under FOIA is disclosure to the world at large, not just the requestor. Just because the complainant is not motivated to use this information to identify the individuals involved does not mean that others would not – this includes the APPG.
34. Usually when considering identification, the Commissioner takes into account whether an individual could learn anything new about the data subject from disclosure. Even though disclosure may only confirm what the APPG already knows about specific contractors or schemes, section 23(1)(b) of the CRCA is clear, if the identity of the individual to whom the information relates can be deduced, it is exempt.
35. The Commissioner is mindful that section 44 is an absolute exemption and, therefore, he cannot take into account whether or not it is within the public interest for these individuals to be identified. If the disclosed information could, as section 23(1) of the CRCA states, lead to the identification of the individual to whom the request relates, or allow their identity to be deduced from said information, it is exempt under section 44(1)(a) of FOIA.
36. Since the Commissioner is satisfied that individuals could be identified from the requested information, section 23(1) of the CRCA is engaged and, by extension, the information is exempt from disclosure in accordance with section 44(1)(a) of FOIA.

Section 14 – vexatious requests – grossly oppressive burden

37. Section 14(1) of FOIA states that:

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.”

38. The Commissioner has published guidance on what may typify a vexatious request.⁸ It is always the request itself, and not the requestor, that is vexatious. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that 'vexatious' could be defined as the 'manifestly unjustified, inappropriate or improper use of a formal

⁸ [Dealing with vexatious requests \(section 14\) | ICO](#)

procedure'. The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.'

39. Sometimes it will be obvious that a request is vexatious and other times it will not. In considering such borderline cases, the key is to weigh up any purpose and value that the request represents against any disruption, irritation or distress that compliance with the request may cause the public authority.
40. HMRC has explained that it considers providing the 'evidentiary documentation' that the complainant wants in this instance would cause such a grossly oppressive burden that this part of the request is vexatious.
41. Usually, when considering the burden that compliance with a request would cause a public authority the relevant exemption is section 12 (cost of compliance exceeds appropriate limit). However a public authority can only apply section 12 when consider the following activities:
 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
42. Section 12 cannot be engaged when a public authority has concerns about the cost and effort of applying redactions to any requested information. This is HMRC's concern regarding the 'evidentiary documentation' requested.
43. A public authority may make a case for section 14(1) on the grounds that the amount of time taken to review and prepare the information for disclosure would impose a grossly oppressive burden upon it. To reiterate, section 14(1) can take into account the time spent on considering exemptions and making redactions whereas section 12 cannot.
44. However, the Commissioner considers that there is a high threshold for refusing a request on such grounds and a public authority is most likely to have a viable request when:
 - The requestor has asked for a substantial volume of information **and**

- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered through the exempt material.
45. HMRC has explained 'the applicant has asked for evidence that the department has taken the compliance action claimed against the relevant schemes. It is clear that such information would include all correspondence on the matters including that between HMRC and the scheme. This would involve a vast amount of information spanning a significant period of time.'
 46. As HMRC has explained to the complainant, there are 15 schemes associated with the 18 contractors. However, HMRC has not expanded on this point any further and therefore the Commissioner does not know how much correspondence has been exchanged between HMRC and each scheme.
 47. Furthermore, HMRC has failed to explain to the Commissioner just how long it has been in correspondence with the scheme providers for. The Commissioner does not know if it was throughout the whole employment of the contractors in question.
 48. Ultimately the Commissioner cannot verify HMRC's claim that compliance with part 2 of the request would involve a 'vast' amount of information spanning a 'significant' period of time.
 49. HMRC has also explained that 'It is also clear that any such information would fall within the definition of revenue and customs information relating to a person. HMRC acknowledges that the complainant has asked for this material to be suitably redacted but would contest that to do so would involve the disclosure of a large amount of blank letter templates as even the dates upon which letters were sent, in conjunction with details of compliance action already in the public domain could result in identification.'
 50. The Commissioner has not had sight of any of the 'documentary evidence' in question. However, he concurs with HMRC that if any information within can identify an individual, it would be exempt.
 51. However, section 14(1) allows a public authority to refuse a request where the amount of time taken to review and prepare the information for disclosure would impose a grossly oppressive burden upon it. This is what the Commissioner is measuring here, not how much of the requested information would be exempt.

52. Whilst HMRC has indicated that, once all exempt information has been removed, it would be left with blank templates it has failed to explain to the Commissioner how burdensome it would be to make these redactions. In fact, since HMRC has already been able to identify that it would be left with blank templates once all exempt information had been identified, he does not consider the exempt information difficult to isolate.
53. HMRC has concluded that 'As the complainant would not be able to attribute the correspondence to a scheme, disclosure would not provide the evidentiary documentation sought. On this basis, HMRC concludes that the request has no serious purpose or value and are unable to justify the burden which compliance with the request would cause.'
54. The Commissioner disagrees that the request has no serious purpose or value. If the UK's tax authority employs individuals who do not abide by the laws that it regulates, there is clearly purpose and value to the request.
55. The amount of redacted, exempt or disclosable material that follows such a request does not, in any way, diminish its serious purpose or value. Even if HMRC disclosed 100 pages of heavily redacted material in response to part 2 of the request, it would still confirm that further action had been taken by HMRC.

The Commissioner's view

56. As previously discussed, there is a high bar for engaging section 14(1) in the manner that HMRC. In this instance, the Commissioner does not consider that this bar has been met.
57. The Commissioner cannot be expected to agree with an application of section 14(1) when he has been given no quantifiable information. For example, he does not know the amount of information that HMRC holds that falls within the scope of part 2 of the request. He also doesn't know how long it would take HMRC to suitably redact any information for disclosure. HMRC may have wished to carry out a sampling exercise to support its position but it has not done so.
58. Though he appreciates that HMRC is concerned that much of the 'documentary evidence' may lead to identification, HMRC has failed to convince the Commissioner that preparing this information for disclosure would impose a grossly oppressive burden. The Commissioner has reached this decision whilst taking into account the serious purpose and value that the request represents.
59. The Commissioner requires HMRC to issue a fresh refusal notice, that does not rely upon section 14(1), in response to part 2 of the request.

Right of appeal

60. 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

61. 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.

62. 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

Alice Gradwell
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