

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 September 2009

Public Authority: Her Majesty's Revenue and Customs
Address: 1 Parliament Street
London
SW1A 2BQ

Summary

The complainant requested information from HMRC about the impact of Missing Trader Intra-Community fraud. Some information was provided but the remainder was withheld by virtue of section 31(1)(d).

The Commissioner has decided that the exemption is not engaged.

The public authority's handling of the request resulted in breaches of certain procedural requirements of the Act as identified in the Commissioner's Decision Notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The request centres on information held about Missing Trader Intra-Community fraud, otherwise known as MTIC or 'carousel' fraud. The following extracts, found online at: http://www.opsi.gov.uk/si/si2007/em/uksiem_20071418_en.pdf, explain what is meant by this type of fraud:

"Over recent years, a sophisticated and systematic criminal attack on the VAT system has developed in the UK, which relies on the ability to buy and sell goods between EU Member States free of VAT. Prevalent throughout Europe, it is known as 'missing trader intra-community' (MTIC) VAT fraud, or in its more evolved forms as 'carousel' fraud."

“MTIC fraud is orchestrated by criminals who register a company for VAT in the UK in order to acquire goods ‘VAT-free’ from another EU Member State. They then sell the goods in the UK, charging VAT to their customers but failing to pay it to HM Revenue & Customs (HMRC). In these circumstances, revenue losses crystallise when, later in the supply chain, the recipient of the supply dispatches the goods outside the UK and claims a repayment from HMRC of the VAT he has been charged.”

“The fraud generally involves high volume supplies of high value goods – typically mobile phones and computer processing chips – through contrived transaction chains. Carousel fraud is a particularly abusive form of the fraud which involves the same goods circulating repeatedly between the UK and other EU Member States, often via third countries outside the EU, with VAT being stolen on each circuit. This form of the fraud relies on the participation of a number of traders to create a contrived supply chain, or chains, the aim of which is to distance the missing or defaulting trader (who fails to pay to HMRC the VAT he has charged to his customers) from the trader who ultimately re-exports the goods and claims a VAT refund.”

3. The request also refers to a procedure called the “extended verification scheme” which was introduced by the public authority. This procedure involves the public authority delaying VAT repayments until it has undertaken rigorous examination of supply chains in order to identify any VAT fraud at any point in the chain.
4. The following links also provide further useful background information:
<http://www.statistics.gov.uk/CCI/article.asp?ID=1066>
<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldecom/101/101.pdf>
[http://www.icaew.com/index.cfm/route/141017/icaew_ga/en/Technical_and_Business_Topics/Faculties/News/MTIC or Carousel Fraud](http://www.icaew.com/index.cfm/route/141017/icaew_ga/en/Technical_and_Business_Topics/Faculties/News/MTIC_or_Carousel_Fraud)

The request

5. On 7 February 2008 the complainant made the following request to the public authority:

“I’m interested in getting some more information on the impact of Missing Trader Intra-Community fraud and would be grateful if you could answer the following questions:

- *How much money is HMRC currently holding in VAT rebates as a result of the extended verification scheme?*
- *How many companies are currently affected by the extended verification scheme?*
- *How many companies are currently awaiting VAT rebates as a result of the extended verification scheme?*

- *How many companies have been awaiting VAT rebates for more than 3 months as a result of the extended verification scheme?*
 - *How is the money held through extended verification schemes being accounted for by HMRC?*
 - *Will companies found to be innocent of any fraud receive interest on VAT rebates that have been held by HMRC?*
 - *When does HMRC expect the problem of MTIC fraud to be resolved?*
 - *When does HMRC anticipate that the extended verification scheme will be brought to a close?"*
6. On 5 March 2008 the public authority responded. It provided some information but withheld the remainder under the exemption in section 31(1)(d) of the Act.
7. On 11 March 2008 the complainant sought an internal review in respect of bullet points 1, 2 and 4 above. She also made the following supplementary request:
- "In addition I would like to know – what is the value of VAT rebates currently subject to on-going litigation?"*
8. On 28 April 2008 the public authority sent out its internal review. It upheld its original stance and also referred to the exemptions at sections 30(1)(c) and 29, although it was unclear whether or not they were actually being relied on. It did not refer to the complainant's supplementary request.

The investigation

Scope of the case

9. On 9 May 2008 the Commissioner received a complaint about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- "HMRC believe that the release of information I have requested may be prejudicial to HMRC's enquiries into MTIC fraud. However, I can see no logical line of reasoning to justify this non-disclosure, particularly when HMRC's extended verification scheme is a matter of public record and I am merely requesting aggregate figures. I believe that HMRC may be misapplying Section 31(1)(d) of the Freedom of Information Act."*
- Further arguments in favour of disclosure were also provided.
10. The Commissioner also asked the complainant about the additional request she made when seeking an internal review. She confirmed that no response was received and that she would like this issue to be addressed.
11. On 24 June 2009 the Commissioner raised a further query with the public authority. He noted that when it had provided its internal review it had implied that it may also be applying the exemptions at 32(1)(c) and 29. However, as it had not included any

public interest tests and no further mention of either exemption had been made it was unclear.

12. The public authority confirmed that it was only relying on the exemption at 31(1)(d).

Chronology

13. On 2 April 2009 the Commissioner wrote to the complainant to advise her that he had commenced his investigation. He asked her to confirm that he had understood the scope of her complaint.
14. On the same day, the Commissioner raised various queries with the public authority and asked for a response within 20 working days. This was acknowledged the following day.
15. On 1 May 2009 the public authority contacted the Commissioner to request a time extension. The Commissioner agreed to a further 10 working days.
16. On 11 May 2009 the complainant confirmed the scope of her complaint.
17. On 21 May 2009 the public authority responded to the Commissioner. It stated that it had reconsidered disclosure but had maintained its original position. It also offered further arguments.
18. On 8 June 2009 the complainant telephoned the Commissioner and sought an update. A written response was sent on 10 June 2009.
19. On 10 June 2009 the Commissioner raised further queries with the public authority. It provided a response on 11 June 2009.

Findings of fact

20. The following table, produced by the public authority, provides an estimated value of MTIC fraud. It can be found online via the following link:
https://www.uktradeinfo.com/pagecontent/documents/MTIC_Oecd.pdf

Estimated MTIC Fraud (£ billion)		
Financial Year	Upper estimate	Lower estimate
2000–01	2.47	1.31
2001–02	2.53	1.72
2002–03	2.34	1.54
2003–04	1.73	1.06
2004–05	1.90	1.12

21. The approximate number of staff engaged on MTIC fraud-related work, published in February 2007, is as follows:

“As HMRC strengthened their strategy to tackle MTIC fraud, they re-deployed an additional 700 compliance officers to verify suspect VAT repayment claims. This brought the total number of HMRC staff currently used on the strategy to over

1,500. Recently, HMRC have decided to further increase their criminal investigation capability, and 68 extra staff will be redeployed to MTIC work in the year 2007–08.”

The figures can be found online via the following link:

<http://www.publications.parliament.uk/pa/ld200607/ldselect/lddeucom/101/7020609.htm>

Analysis

Substantive procedural matters

22. The Commissioner finds that the public authority should have responded to the supplementary request made by the complainant on 11 March 2008. By failing to respond it breached section 10(1).

Exemption

Section 31 – law enforcement

23. Section 31(1)(d) provides that:

“Information ... is exempt information if its disclosure under this Act would, or would be likely to, prejudice...the assessment or collection of any tax or duty or of any imposition of a similar nature...”

24. Section 31 is a prejudice based exemption and therefore to engage the exemption the public authority must demonstrate that disclosure would, or would be likely to, prejudice the collection of any tax or duty.

25. The Commissioner has been guided on the interpretation of the phrase ‘would, or would be likely to’ by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* [EA2005/0005] confirmed that *‘the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk’* (Tribunal at paragraph 15). This interpretation followed the judgment of Mr Justice Mundy in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In this case the Court concluded that:

“likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there “may very well” be prejudice to those interests, even if the risk falls short of being more probable than not”.

With regard to the alternative limb of ‘would prejudice’, the Tribunal in *Hogan v Oxford City Council & The information Commissioner* [EA2005/0026, EA2005/0030] commented that *‘clearly this second limb of the test places a stronger evidential burden on the public authority to discharge’* (Tribunal at paragraph 36).

26. The public authority's position as to whether disclosure *would* or *would be likely* to cause prejudice varies within its arguments. The Commissioner has therefore considered the lower threshold of *would be likely* for all of the arguments applied.
27. The public authority has advised the Commissioner that, because the information requested relates to its extended verification of VAT refund claims submitted by traders suspected of being involved in MTIC fraud, its release would be likely to prejudice the assessment and collection of VAT. The Commissioner would like to stress that the information requested consists of the total amount of money held in respect of VAT rebates, the total number of companies which are affected and the total number of these companies which have been awaiting their rebate for more than 3 months. The request therefore involves three figures at a given point in time. No further breakdown or methodology has been requested.
28. The public authority advised the complainant that disclosure would be likely to prejudice its enquiries, and the verification of VAT repayment claims, and that it needed to keep details of its verification activity confidential to protect the collection of revenue and stop fraud. It also argued that disclosing the information could enable those orchestrating the fraud to ascertain the Government's understanding and grasp of the scale of the attack and introduce countermeasures to further frustrate the Government's ability to tackle the fraud. However, it did not, in the Commissioner's opinion, offer the complainant any plausible reasons to substantiate these beliefs. As previously stated, the information requested consists of three figures only.
29. The public authority also advised the Commissioner that its: *"... verification activity should remain confidential in order to manage the overall verification programme which protects the collection of revenue and stops fraud"*. It explained how, in its view, this could be done in several ways. These are covered in the analysis below.
30. The public authority stated that:

"To disclose this [total] amount, albeit a figure at a particular point in time, would allow fraudsters to compare this figure to the published figures for estimated tax lost to MTIC fraud. It would then be possible to draw conclusions about HMRC's success rate in combating MTIC fraud. Conclusions could also be drawn about the effectiveness of HMRC's Intelligence activity by those with knowledge of the true scale of the fraud".
31. The Commissioner notes that the request includes the total monies which were held at the time of the request, i.e. February 2008. Such a figure could not be compared with published estimates as the only ones available at the time of the request were annual figures for 2006-07. Even those published in November 2008, some 11 months after the request, relate only to an annual estimate for 2007-08. Therefore, in the Commissioner's opinion, no accurate comparison was possible. Even forthcoming figures, which will presumably be published later this year, will not provide an accurate benchmark as the request is for one point in time when investigations may have been very active or very slow. The Commissioner is unable to find any figures which specifically relate to February 2008.

32. Furthermore, it is impossible to assess how many of the companies under investigation, i.e. those whose VAT retentions make up the total figure, would eventually have proceedings taken against them and it is therefore impossible to gauge the public authority's 'success rate'. The Commissioner is of the view that having its VAT withheld does not necessarily presume any guilt on behalf of that company and, in addition, it is likely that the outcome of the investigation into many of the companies will not result in any prosecution at all. Even in those cases which are brought to prosecution, the Commissioner is of the view that it is also likely that the public authority may not be 'successful'. Therefore, any accurate determination of 'success' will only be ascertained at some unknown point in the future and the Commissioner is not persuaded that it can be gauged by disclosure of the requested information.
33. The request also asks for the number of companies who have been awaiting a VAT rebate for more than 3 months. Whilst it may be argued that this figure could show the turnaround of cases this would again be tenuous. There is no way of knowing the reasons behind the length of investigations. For instance, cases may be under investigation according to the type of product involved, several companies may be linked together in one large investigation rather than all being investigated separately, or they may simply be investigated in chronological or alphabetical order. An individual company may also be the subject of many separate investigations. There are a myriad of reasons which could explain the turnaround, whether fast or slow. Such detail has not been requested.
34. Even if it were feasible to gauge the likely outcome of an investigation, the Commissioner does not accept that the information requested would have any bearing on this. Conclusions can already be drawn about the public authority's effectiveness by reading its annual report or following high profile cases through the court system or media. The Commissioner does not therefore agree that disclosure of the information would be likely to have the prejudicial effects described.
35. The public authority also stated that:
- "The amount "held in abeyance" represents the value of claims that are still being worked by investigators. If this figure was in the public domain, an individual MTIC trader would be able to estimate, from the value of his own claim and the number of investigators working on it, roughly how many investigators in total HMRC must have working on these old claims (backlog). By sharing information, traders as a group would be able to make even more precise estimates of this nature. It is public knowledge how many staff in total HMRC has working on MTIC. Therefore, the trader would be able to gauge how many staff are left to investigate new cases. This would provide a valuable input into any calculation of the likelihood of a new MTIC fraud going undetected".*
36. The Commissioner does not agree that the information requested would provide an accurate basis for potential criminals to assess the chances of successfully evading detection or prosecution for relevant frauds. Although a trader may know the amount of money involved in an investigation related to their own activities, and possibly other investigations as well, the Commissioner is not convinced that there

is a 'real and significant' risk of an individual building up a profile of sufficient accuracy that it would prejudice the collection of tax. As the public authority itself has intimated above, even if traders as a group were to share information they would only reach *more precise estimates*, rather than accurate assessments. There are many staff, as shown in paragraph 22 above, and they could be deployed in many ways other than as individuals being allocated to specific cases or operations.

37. A further argument submitted by the public authority to the Commissioner was:

"HMRC have sought to limit the opportunity and motivation to commit fraud and increase the risk to the fraudster. Whilst it is appropriate to publish annual estimates of fraud, HMRC have chosen not to disclose the total amount denied or withheld at any particular time. Disclosure of this information would provide the fraudsters an opportunity to calculate the prospects of going undetected and therefore the expected return upon their financial investment. This could encourage further economic attack. It is anticipated that by withholding this information and limiting details about our future activities the fraudsters will be deterred from further investment and involvement in MTIC related activity".

38. The Commissioner does not accept that disclosure of the requested information would provide potential fraudsters with the opportunity to calculate their prospects of going undetected with any accuracy. He is of the opinion that the information requested is too limited to allow this to be assessed to any reliable degree.
39. The public authority has also contended that: *"release of the requested information could mean that fraudsters change their tactics which would in turn hinder its actions to protect revenue from theft"*. Whilst the Commissioner may well accept the argument that a change in tactics by fraudsters could make their apprehension more difficult, he is not convinced that release of the three figures requested would be likely to assist fraudsters to do so. The public authority further remonstrates that releasing the information would enable those orchestrating fraud to ascertain the grasp of the scale of the MTIC attack, thereby resulting in fraudsters introducing counter measures to further frustrate the tackling of fraud. Again, the Commissioner does not concur. He is not convinced that there is a realistic likelihood that three isolated aggregated figures would make potential fraudsters behave any differently.
40. The public authority has also advised the Commissioner that, because of the scale of MTIC fraud, its consequences for the Exchequer are significant. It has therefore asserted that if the extended verification process were undermined this would cause *"real prejudice to HMRC's ability to assess that the correct amounts of VAT had been paid over to HMRC at the appropriate stage in the supply chain and therefore determine whether a repayment should be made"*.
41. The Commissioner accepts the public authority's view that the overall scale of MTIC fraud is of significance for the Exchequer. He also accepts that any undermining of the extended verification process could be prejudicial to its ability to assess the associated VAT payments. However, as explained above, he is not persuaded that disclosure of the information requested would be likely to cause

such an effect. He is of the opinion that more detail would be required before there would be a real and significant likelihood of any such effect occurring.

42. Further arguments have been presented regarding the possibility of future requests. The public authority has stated that *“if the information were disclosed on this occasion and then similar requests were made in the future, fraudsters could put together a picture of how the investigation backlog is changing over time”* and *“that disclosure of this information could set a precedent of disclosure which would result in fraudsters building up a matrix of information about HMRC’s operational performance in tackling MTIC fraud”*. However, the Commissioner notes that the request is only for one point in time and there is therefore no possibility of any analysis of patterns being enabled. If future requests are received the public authority should consider whether the requested information is exempt by reference, amongst other factors, to the nature of other information already in the public domain.
43. The Commissioner does not accept that disclosure of the requested information would be likely to have an adverse impact on the public authority’s effectiveness in tackling MTIC fraud, therefore prejudicing its collection and assessment of VAT. Accordingly, he does not find that the exemption is engaged.

Procedural Requirements

44. The Commissioner has decided that the withheld information should have been disclosed. Therefore, by not providing the requested information to the complainant within 20 working days of the request, the public authority breached section 10(1). By not providing it to the complainant by the time of the completion of the internal review, it breached section 1(1)(b).

The Decision

45. The Commissioner’s decision is that the public authority did not deal with the request for information in accordance with the Act.
46. The public authority inappropriately withheld the requested information under section 31(1)(d). In doing so it breached sections 1(1)(b) and 10(1).
47. The public authority failed to respond to a supplementary request for information. In doing so it breached section 10(1) of the Act by failing to comply with section 1(1) within twenty working days following receipt of the request.

Steps required

48. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- the requested information, as identified in paragraph 7 above, should be released to the complainant;
- a response to the supplementary request should be provided in accordance with section 1(1)(a) of the Act by informing the complainant whether it holds the information, or issuing a refusal notice explaining why it is excluded from the section 1(1)(a) duty to confirm or deny if information is held. If the exclusion from the duty to confirm or deny does not apply, and the information is held, then the public authority should respond to the complainant's request in accordance with section 1(1)(b) by either communicating the information to him or issuing a valid refusal notice. Any refusal notice issued should comply with the requirements of section 17.

49. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

50. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

51. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 1st day of September 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1 provides that -

- (1)** *Any person making a request for information to a public authority is entitled –*
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) if that is the case, to have that information communicated to him.*

Section 10 provides that -

- (1)** *Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.*
- (2)** *Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt*
- (3)** *If, and to the extent that –*
- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or*
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,*
- the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.'*
- (4)** *The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.*
- (5)** *Regulations under subsection (4) may –*
- (a) prescribe different days in relation to different cases, and*
 - (b) confer a discretion on the Commissioner.'*
- (6)** *In this section –*
- “the date of receipt” means –*
 - (a) the day on which the public authority receives the request for information, or*
 - (b) if later, the day on which it receives the information referred to in section 1(3);*
- “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.'*

Section 31 provides that –

- (1)** Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice,
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
 - (e) the operation of the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
 - (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.
- (2)** The purposes referred to in subsection (1)(g) to (i) are-
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
 - (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
- (3)** The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).