

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

### **Decision notice**

**Date:** 30 November 2015

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

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

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1. The complainant submitted a request to the public authority for information relating to the Department for Works and Pensions' referral of a number of its off payroll contractors to the public authority for investigation following their failure to provide income tax assurances. The public authority disclosed some information relevant to the request. It however withheld some figures within the scope of the request in reliance on the exemptions at sections 31(1)(d) and 44(1)(a) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on section 44(1)(a) to withhold the information described as "the disputed information" in this notice.
3. No steps are required.

### **Request and response**

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4. On 27 January 2015 the complainant submitted a request for information to the public authority in the following terms:

*'Within the Department for Work & Pensions, 2013/14 Annual Accounts Report, Page 160 it states that 71 out of 79 of their payroll contractors were referred to HMRC for investigation for failing/refusing to provide income tax assurances in accordance with HM Treasury, Procurement Policy Note Tax Arrangements of Public Appointees (Action Note 07/12 24/12/2012).'*

- 1) What date did the DWP submit the details of all the aforementioned 71 DWP off payroll contractors to HMRC for investigation?*
  - 2) Were all 71 DWP off payroll contractors fully investigated by HMRC?*
  - 3) How many of the 71 DWP off payroll contractors paid the correct amount of Income Tax for the period 2013/2014 without HMRC intervention?*
  - 4) How many of the 71 DWP off payroll contractors failed to pay any Income Tax from their DWP income for the period 2013/2014 which required HMRC intervention?*
  - 5) How many of the 71 DWP off payroll contractors failed to pay the correct amount of Income Tax from their DWP income for the period 2013/2014 which required HMRC intervention?*
  - 6) Did you provide the DWP of the names [sic] of those DWP off payroll contractors who failed to pay any or the correct amount of Income Tax from their DWP income for the period 2013/2014 which required HMRC intervention to further protect taxpayers money in accordance with "HM Treasury, Managing Public Money" & HM Treasury Procurement Policy Note Tax Arrangements of Public Appointees (Action Note 07/12 24/12/2012) Para 9 which states that their contracts should be immediately terminated for failing to pay or provide income tax assurances?*
  - 7) Since you received the aforementioned 71 cases for investigation how many more DWP off payroll contractors have been referred to HMRC by the DWP for income tax investigation?*
5. The public authority provided its response to the request on 12 March 2015. It explained that updated figures had since shown that DWP requested, but did not receive, income tax assurances for 27 off payroll contractors, not 71 as was originally quoted.
  6. It also informed the complainant that the relevant date was 3 April 2014 with regards to item 1 of his request. With regards to item 6, the public authority explained that it did not pass on the relevant information primarily due to taxpayer confidentiality.
  7. With regards to the remaining parts of the request, items 2-5 (inclusive) and item 7, the public authority withheld the information in scope on the basis of the exemptions at sections 31(1)(d) and 44(1)(a) FOIA.
  8. On 12 March 2015 the complainant requested an internal review of the public authority's decision.

9. The Commissioner understands that the public authority wrote to the complainant with details of the outcome of the review on 14 April 2015. It upheld the original decision.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 22 April 2015 to complain about the way his request for information had been handled.
11. Following the obtaining of clarification as to the status of the internal review, on 26 August 2015 the Commissioner wrote to the complainant and advised him of the scope of his investigation.
12. The scope of the Commissioner's investigation was to determine whether the public authority was entitled to withhold information within the scope of items 2-5 and 7 (also referred to as "the disputed information" in this notice) in reliance on the exemptions at sections 31(1)(d) and 44(1)(a).

### **Reasons for decision**

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#### **Section 44(1)(a)**

13. The public authority relied on both the exemptions at sections 31(1)(d) and 44(1)(a) to withhold the disputed information.
14. The Commissioner first considered whether the absolute exemption<sup>1</sup> at section 44(1)(a) was correctly engaged.
15. Information is exempt on the basis of section 44(1)(a) if its disclosure is prohibited by or under any enactment.<sup>2</sup>
16. The public authority submitted that the combined provisions in sections 18(1) and 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA) prohibit the authority from disclosing the disputed information.

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<sup>1</sup> An exemption not qualified by the public interest set out in section 2(2)(b) FOIA.

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2000/36/section/44>

17. This is because the disputed information is held by the public authority in connection with its functions, relate to "persons", and disclosure would enable the identity of such persons to be deduced. The small group of individuals involved increases the likelihood of identification. The public authority further submitted that the individuals subject to investigations could also identify themselves should the disputed information be disclosed. Those who had not been referred by the DWP for investigation would also be able to make that deduction from the disclosure of the disputed information.

*Commissioner's findings*

18. 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.'*

19. The Commissioner is satisfied that the disputed information is held by the public authority in connection with its function to assess and collect tax.

20. Although there are exceptions to section 18(1) contained in sections 18(2) and (3) CRCA, section 23 CRCA was amended by section 19(4) of the Borders, Citizenship and Immigration Act 2009 to make clear that sections 18(2) and (3) are to be disregarded when considering disclosure of revenue and customs information relating to a person under FOIA.

21. Notwithstanding the above, section 23(1) CRCA 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.....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.*

*(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.'*

22. Therefore, information prohibited from disclosure by virtue of section 18(1) CRCA is exempt information by virtue of section 44(1)(a) FOIA only 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.

23. The Commissioner accepts that the small and confined group in question increases the likelihood that their colleagues would identify and associate individuals to the figures in question. Out of the 27 cases in total, less than 10 cases (less than 5 for some) are relevant to each of items 2-5 of the request. This small pool of relevant cases increases the chances of identification.
24. With regards to item 7 of the request, clearly off payroll contractors who have not been referred from the DWP for investigation know that already. However, the relevant consideration is the high likelihood that disclosing the figure pursuant to item 7 of the request under the FOIA would enable off payroll contractors at the DWP (and possibly others), who have not been referred for income tax investigation as part of the initial 27 referrals, make that deduction. Section 23(1) CRCA clearly prohibits disclosure of information under FOIA if it would enable the identity of a person to whom it relates to be deduced.
25. Specifically, the Commissioner accepts that it is highly likely that individual payroll contractors not subject to the initial 27 referrals will be able to deduce whether themselves or colleagues will have been referred to HMRC for investigation. As in relation to items 2-5 of the request, the Commissioner has also taken into account the withheld figure in relation to request 7 when reaching this conclusion.
26. The Commissioner therefore finds that the public authority was entitled to withhold the disputed information in reliance on section 44(1)(a) FOIA.
27. Having found this exemption engaged, the Commissioner did not consider the applicability of section 31(1)(d).

## Right of appeal

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28. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

29. 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.
30. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**