

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 November 2015

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

#### Decision (including any steps ordered)

---

1. The complainant submitted a request for communications relating to a named person. The public authority neither confirmed nor denied whether it held the information requested on the basis of section 44(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to neither confirm nor deny whether it held the information requested on the basis of section 44(2)(a) FOIA.
3. No steps are required.

#### Request and response

---

4. On 12 February 2015 the complainant submitted a request to the public authority for:  
*'a copy of all communications between officers of HMRC, and to and from officers of HMRC, which relates to trust matters purporting to concern [named person] and/or this taxpayer.'*
5. On 9 March 2015, the public authority informed the complainant that it could neither confirm nor deny it held information within the scope of the request on the basis of the provisions in section 44(2) FOIA.
6. On 7 April 2015 the complainant requested an internal review of the public authority's decision.
7. On 16 April 2015 the public authority wrote to the complainant with details of the outcome of the review. The original decision was upheld.

## Scope of the case

---

8. The complainant contacted the Commissioner in July 2015 to complain about HMRC's decision.
9. The scope of the Commissioner's investigation therefore, was to determine whether the public authority was entitled to rely on section 44(2) to neither confirm nor deny whether it held the information requested above by the complainant on 12 February 2015.

## Reasons for decision

---

### Section 44(2)

10. Section 1(1) FOIA provides two rights to applicants. They are:
  - a) The right to be informed in writing by the public authority whether or not it holds the information requested by the applicant, and
  - b) If so, the right to have that information communicated.
11. Both these rights are subject to exemptions in FOIA.
12. The right in section 1(1)(a) is commonly referred to as a public authority's "duty to confirm or deny" whether it holds information.
13. Section 44 FOIA (prohibitions on disclosure) states:

*'(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 EU obligation, or*
  - (c) would be punishable as a contempt of court.*

*(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).*
14. As can be seen from the above, a public authority is, by virtue of the provisions in section 44(2), excluded from confirming or denying whether it holds information requested by an applicant if to do otherwise (ie to issue a confirmation or denial) is prohibited by or under any

enactment, is incompatible with any EU obligation, or would be punishable as a contempt of court.

15. The exemptions and the exclusion from the *duty to confirm or deny* in section 44 are absolute. This means that they are not subject to a public interest test. Once it is determined that they are engaged, a public authority is not required to consider whether there is a public interest in complying with the duty to confirm or deny or in disclosing the information held.<sup>1</sup>
16. The public authority submitted that to confirm or deny whether it holds the information requested by the complainant would reveal information about [named person] which it is prevented from doing by virtue of the duty of confidentiality imposed on the authority under section 18(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA). It explained that sections 18(1) and 23(1) of the CRCA prohibit the authority from disclosing any information held in connection with its functions under FOIA. Such information would be exempt from disclosure on the basis of section 44(1). Therefore, by virtue of section 44(2), the public authority was also excluded from issuing a confirmation or denial in response to an applicant's request under FOIA if to do otherwise would reveal information prohibited from disclosure under the CRCA.

#### *Commissioner's findings*

17. 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.'*

18. The Commissioner is satisfied that the requested information if held, would be held by the public authority in connection with tax related functions of the authority.
19. 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.

---

<sup>1</sup> If any of the exemptions at section 44(1) have been relied upon by the public authority.

20. 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.'*

21. Therefore, information prohibited from disclosure by virtue of section 18(1) CRCA (in this case, on the basis that if held, it would be held by the authority in connection with one of its functions) is exempt information by virtue of section 44(1)(a) FOIA only if its disclosure would identify a *'person'*. This includes both legal and natural persons.

22. The Commissioner is satisfied that confirming or denying whether the information requested by the complainant is held by the public authority would identify a *person* within the meaning in section 23(1) CRCA. The request clearly refers to the person to whom it relates. It therefore follows that a response which confirms or denies whether the requested information is held would identify the person in question and reveal information relating to their tax affairs in public. This is clearly prohibited under the CRCA.

23. The Commissioner therefore finds that section 44(2)(a) FOIA is engaged because the public authority was entitled (by virtue of the CRCA) to neither confirm nor deny holding any information within the scope of the complainant's request.

### **Other Matters**

24. To the extent that any of the information requested, if held, would constitute the complainant's own personal data, the public authority has obligations under the Data Protection Act 1998 (DPA) which the complainant appears to have been made aware of prior to submitting his complaint to the Commissioner. The complainant may therefore wish to exercise his rights under the DPA in relation to this request.

## **Right of appeal**

---

25. 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@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)

26. 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.
27. 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 .....**

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