

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2018

Public Authority: HMRC
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information from HMRC about statistics for non-EEA nationals in line with an HMRC publication on EEA nationals. HMRC responded setting out that the cost of complying with the request would exceed the appropriate limit and accordingly relied on section 12 FOIA to refuse the request. It advised the complainant that in order to refine his request he may wish to focus on a specific area of interest within the HMRC publication. The complainant accepted the application of section 12 and sought guidance from HMRC as to how he might further refine his request.
2. The Commissioner's decision is that HMRC did not provide the complainant with advice and assistance and has therefore breached section 16 FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide advice and assistance in relation to the request dated 15 November 2016 to enable the complainant to submit a refined request within the cost limit.
4. 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 15 November 2016, the complainant wrote to HMRC and requested information in the following terms:

"On 25 August 2016, the HMRC publication "Further Statistics on EEA nationals" provided a range of information resulting from analysis of personal taxes paid and HMRC benefits received by EEA nationals.

Please provide me with any similar analysis carried out (or the results of such analysis) for non-EEA nationals in the same format. I believe that such information is likely to exist essentially in the form requested. In particular, an Office for National Statistics publication of 12 May 2016 "Note on the difference between National Insurance number registrations and the estimate of long-term international migration" says "HMRC also shared with us analysis of those who had arrived, or registered for a NINO in the 4 years, to 2013-14 and were subject to income tax NICs and, or received HMRC benefits at some point in 2013/14 – the latest year available. They found 1.0 million such individuals were from the EEA and 0.4 million were from non-EEA countries." As the August HMRC publication includes specific results for those EEA nationals who had arrived, or registered for a NINO in the four years to 2013-14, it seems very likely that similar information is held by HMRC for non-EEA nationals as that published for EEA nationals by HMRC.

6. The request referred to the duty to provide advice and assistance and set out that the complainant was happy to discuss the scope of the request if that would be helpful.
7. The request was given the reference number FOI2016/00293 by HMRC.
8. HMRC responded on 14 December 2016 explaining that it held the information requested but that would exceed the cost limit to provide the analysis required. It set out that it was relying on section 12(1) and would not process the request further..

9. The response set out the following:

"In order to refine the scope of your request you may wish to focus on a specific area of interest within the HMRC publication."

10. On 14 December 2016, the complainant wrote to HMRC setting out that his initial request had explained that HMRC was likely to hold

information falling within the scope of the request because the Office for National Statistics (ONS) had made reference, in a published document, to the fact that HMRC had shared analysis with it. He explained that as he did not know what the analysis was, or what other analysis may have been undertaken, he could not be sure which specific area of the HMRC publication regarding EEA nationals might have corresponding information for non-EEA nationals.

11. He explained that rather than play 'pin the tail on the donkey' he would be grateful if HMRC would advise what analysis had been carried out in relation to non-EEA nationals. He again referred to the FOI duty placed on public authorities to provide advice and assistance and offered to discuss the request with HMRC.
12. On 19 January 2017 and again on 31 January 2017, the complainant wrote to HMRC for an update. He did not receive a response.
13. On 2 February 2017, the complainant wrote to a senior official in HMRC with FOIA responsibility. The complainant asserts that this official had previously invited him to get in touch directly if requests were not being handled in a timely manner. The complainant set out in his letter that following HMRC's response to his request he could have submitted a large number of separate FOIA requests asking for information matching each of the tables (of which there were six) in the HMRC August 2016 publication to which he had referred in his request. He further explained that he had not wished to waste anyone's time by doing this. He asked the senior official to look into his case in order to forestall those new multiple requests which otherwise he would be forced to make.
14. In the absence of any response from HMRC, the complainant submitted six further requests on 10 February 2017. These are detailed in annex A.
15. On 10 March 2017, HMRC responded. It set out that in line with section 12(4) it had aggregated those requests with the request dated 15 November 2016 and with a further request which the complainant had submitted on 24 November 2017 for information relating to the 2016 publication and EEA nationals. HMRC relied on section 12(1) to refuse to comply with the aggregated requests. The Commissioner will address the procedural issue of aggregation in the 'other matters' section of this decision notice.
16. HMRC explained to the complainant that it had provided what scope there was for refining the request in its initial response.
17. HMRC went on to explain in its response that the volume of requests and correspondence, the nature of the requests and the tone of

language used meant that it has considered ICO guidance (Section 14) in terms of any future requests the complainant may submit.

18. The complainant requested an internal review on 13 March 2017 with a response being issued by HMRC on 19 May 2017. It upheld its decision in relation to the application of section 12(1) in respect of all 8 requests which had been aggregated.
19. Between 13 March 2017 and 19 May 2017, HMRC contacted the complainant twice, once by telephone on 21 April 2017 and once, by email on 26 April 2017 in response to an email from the complainant.

Scope of the case

20. The complainant contacted the Commissioner 1 September 2017 to complain about the way his request for information dated 15 November 2016 had been handled. He did not dispute the application of section 12(1) to his requests but asked the Commissioner to consider whether there had been a breach of section 16 – duty to provide advice and assistance in respect of his initial request of 15 November 2016.
21. The Commissioner considers the scope of her investigation is to determine whether HMRC failed in its duty to provide advice and assistance in relation to the request dated 15 November 2016 and whether it has therefore breached section 16.

Reasons for decision

Section 16 – advice and assistance

22. Section 16(1) places a duty on a public authority to provide advice and assistance, so far as it would be reasonable to do so to those who have made or propose to make a request for information to it.
23. In its submission to the Commissioner, HMRC asserted that the Commissioner has presented a partial account of the correspondence and that notably there are three requests missing from the Commissioner's account which are pertinent to HMRC's compliance with its section 16 duty.
24. HMRC has explained that following the refusal of his request dated 15 November 2016, the complainant made six requests for information on 10 February 2017, all of which related to separate tables within the publication referred to in the original request. It is HMRC's position that

having split his request in this manner it was clear that the complainant understood how his request might be refined but that he wanted HMRC to effectively work up to the cost limit of what was possible rather than select a particular focus of interest as he had been advised.

25. In order to support its position that it has discharged its duty under section 16, HMRC has gone on to set out that following its internal review response dated 19 May 2017, the complainant submitted two further requests on 20 May 2017. These requests are detailed at annex B.
26. The Commissioner notes that the first of these later requests dated 20 May 2017 is for information on non EEA nationals and the second is for information in relation to EEA nationals.
27. HMRC aggregated the requests and refused them in accordance with section 12 FOIA.
28. HMRC notes that the complainant did not seek an internal review of this decision but did submit a fresh request for information dated 19 July 2017. The detail of that request is set out at Annex C.
29. The Commissioner notes that this request is for information relating to the A10¹ countries and the rest of the EEA (the EU countries plus Iceland, Lichtenstein and Norway).
30. HMRC has set out to the Commissioner that because the request was narrowed to within the cost limit it was able to respond substantively to this request and did so, albeit outside of the statutory time limit of 20 working days.
31. In its submission, HMRC asserts that despite prolonged engagement with the complainant "*on this particular issue*", HMRC has demonstrably provided enough guidance to the applicant for him to narrow his request in order to bring it within the cost limit and access information of particular interest to him.
32. It has further set out that it has maintained its original position throughout that it is for the requester to identify which part of the publication they were most interested in.
33. It is HMRC's position that its final position represents successful resolution in this case and it has set out that it would strongly urge the Commissioner to consider these subsequent requests rather than only

¹ Countries which joined the EU on 1 May 2004

consider the earlier requests for information as indicated in her initial letter.

34. Of its response to the complainant, HMRC has set out to the Commissioner that:

“our response to the complaint per se is grounded in the reality of how the matter was satisfactorily resolved in the end. To not consider that outcome seems artificial, when you are examining HMRC’s conduct and addressing [complainant’s name] complaint”

35. HMRC has reiterated its position that it has complied with section 16 and that this is demonstrated by the applicant making the final request which it could comply with because it was sufficiently focussed to allow HMRC to respond within the cost limit.
36. The Commissioner considers that the request made by the complainant on 15 November 2016 was for information in relation to non EEA nationals but that the information disclosed to the complainant, which HMRC considers a resolution to the request dated 15 November 2016, is information about EEA nationals and cannot possibly be seen to provide a resolution as HMRC states. The complainant has confirmed that the disclosure by HMRC contained no part at all of the information requested in relation to non-EEA nationals.
37. The Commissioner considers that from the correspondence she has seen, the complainant had made a reasonable request for information and following HMRC’s response, accepted the position that HMRC was entitled to rely on section 12(1).
38. She notes that HMRC did not provide any rationale behind its application of section 12(1).
39. The Commissioner’s section 12 guidance² sets out at paragraphs 37 and 38 that it is useful for a public authority to set out how it has calculated the costs of complying with a request and further sets out that providing a suitable breakdown is likely to be required as part of a public authority’s statutory obligations under section 16 to provide advice and assistance
40. In the particular circumstances of this case, the Commissioner considers that it is at best disingenuous of a public authority to advise a requester that they should refine their request to focus on a specific area of interest as this does not give the requester any insight as to how he

² https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

might refine it to bring it within the cost limit. This is particularly pertinent when the complainant has no idea how or why his request has exceeded the cost limit.

41. In requesting advice and assistance, the complainant made it quite clear that HMRC's publication contained different tables setting out different information in relation to EEA nationals and that in order to help him refine his request it would be useful to know what similar analysis had been carried out in relation to non-EEA nationals.
42. The Commissioner notes HMRC's position that in splitting his request into six parts, the complainant had demonstrated that it was clear that he understood how his request could be refined. The Commissioner considers that the initial request asked for information about non-EEA nationals in line with that which was published in relation to EEA nationals. As this was set out in tables, it is easy for anyone to see that a request could be narrowed by identifying only some of the tables. However, it is the Commissioner's position that it is entirely impossible to determine, without any advice or assistance or any explanation of the rationale behind the application of section 12, how you could refine the request to bring it within the cost limit. The Commissioner considers that the complainant would indeed have no option but to play 'pin the tail on the donkey'.
43. The Commissioner does not consider that the request for advice and assistance was unreasonable in the circumstances and also considers that HMRC should have been able to advise the requester whether it had conducted similar analysis for non-EEA nationals or should have been able to advise the complainant that no similar analysis had been conducted. Either way, it should have provided further advice and assistance to the complainant.
44. The Commissioner considers that the nature of the request suggests that the complainant is interested in all of the tables and knowing what corresponding analysis had been conducted in relation to non-EEA nationals would have allowed him to make a refined request which could potentially lead to compliance by HMRC.
45. The Commissioner is concerned by HMRC's reluctance, and on several occasions, failure to engage with the complainant in order to assist him by responding to his particular request for advice and assistance.
46. In the absence of any response to his request for advice and assistance, it is not surprising that the complainant sent 'chaser' correspondence to HMRC and then took the step of writing to a senior official. However, HMRC still failed to respond to the complainant.

47. The complainant considers that the lack of engagement from HMRC forced him to submit the six requests for information about non-EEA nationals referencing the tables for EEA nationals. Having aggregated the requests and relied on section 12(1), HMRC stated that it had provided what scope there was for refining the request.
48. The Commissioner considers that HMRC has failed in its duty to provide the complainant with advice and assistance of any description in this case and has created an environment which effectively leaves the complainant with little alternative other than to submit a breakdown of his request or abandon it completely.
49. Contrary to HMRC's assertion that the complainant was trying to get HMRC to work up to the appropriate cost limit when he submitted the request dated 10 February 2017, the Commissioner considers that HMRC had effectively encouraged this situation by not providing any advice or assistance and then used it to rely on aggregation of the requests to again rely on section 12(1). HMRC still did not discharge its duty under section 16.
50. It is the Commissioner's position that HMRC has breached section 16 in this case and could have perhaps avoided the case being brought to her office for a decision had it engaged in meaningful dialogue with the complainant in an attempt to resolve the case.

Other matters

51. The Commissioner considers that HMRC's handling of this case has been extremely poor.
52. HMRC did not set out any detail regarding its initial, or indeed subsequent reliance on section 12(1) and this has been brought to HMRC's attention in its handling of previous section 12 cases. Although it is not the application of section 12(1) which is under consideration here, the Commissioner considers that it is appropriate to remind HMRC that her guidance is there to assist public authorities and HMRC should ensure that it considers this guidance in future cases where it seeks to rely on section 12.
53. Again, although the reliance on section 12(1) is not in itself under scrutiny in order to reach a decision; as a responsible regulator the Commissioner must address any procedural issues which give cause for concern.
54. She considers that HMRC was entitled to aggregate the six requests submitted on 10 February 2017, but does not consider that it was

entitled to aggregate those requests with the request dated 15 November 2016. She notes that from 15 November 2016 to 10 February 2017, inclusive, there are 61 working days. Whilst this is only one day more than the permitted time, the Commissioner considers that the complainant may have timed his request in order to ensure that the two requests could not be aggregated and accordingly she cannot allow any leeway in respect of the time frame.

55. However, it is the Commissioner's position that even if the requests had been received within a period of 60 consecutive working days, the interim correspondence relating to the request dated 15 November 2016 is such that it is clear that the request dated 10 February 2017 should have been considered either as a refined request or, if it is for information of the same description as the request dated 15 November 2016 then it should have been considered as a repeat request. What is abundantly clear is that whether it was a fresh request, a refined request or a repeat request, it could have been avoided had HMRC provided adequate advice and assistance in relation to the request dated 15 November 2016.
56. In setting out to the Commissioner that her investigation should consider those requests made subsequent to the requests dated 15 November 2016 and 10 February 2017, HMRC has sought to persuade the Commissioner that the requests dated 15 November 2016 and 10 February 2017 have been resolved successfully but the complainant does not accept that this is the case nor does the Commissioner.
57. The Commissioner considers that the two requests received on 20 May 2017 were for information in relation to EEA nationals and non-EEA nationals. These were aggregated and refused under section 12. Two months later, the complainant made a fresh request for information in relation to EEA nationals only and this request was complied with.
58. It is the Commissioner's position that this last request made to HMRC is a fresh request and has no relevance to either the request dated 15 November 2016 or the request dated 10 February 2017 given that these were both for information about non-EEA nationals. It is difficult to see how HMRC could have considered that it had successfully resolved the request of 15 November 2016 which sought information about non-EEA nationals by responding to a request for information made some 8 months later for information about EEA nationals.
59. The Commissioner would ask HMRC to fully consider the wording of requests before asserting that disclosure of information in relation to one request means that a different request has been successfully resolved.

60. The Commissioner notes that the complainant had requested an internal review on 13 March 2017 and a response was issued on 19 May 2017. Whilst there is no statutory time limit for completing internal reviews, the Commissioner's guidance sets out that reviews should be completed within 20 working days and in exceptional circumstances within 40 working days but in no circumstances should the time taken for review exceed 40 working days. In this case, 47 working days had passed when the review response was issued.
61. The Commissioner asks that HMRC ensures that internal reviews are completed in accordance with her guidance.

Right of appeal

62. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

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

63. 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.

64. 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

Annex A

Requests submitted 10 February 2017

1. (FOI2017/0253) Table A.1 provided a breakdown of tax credit entitlement for EEA nationals by different family structures.

Please provide me with any similar analysis carried out (or the results of such analysis) for non-EEA nationals in the same format.

2. (FOI2017/0254) Table A.2 provided a breakdown of tax credit entitlement for EEA nationals by out-of-work and in-work families.

Please provide me with any similar analysis carried out (or the results of such analysis) for non-EEA nationals in the same format.

3. (FOI2017/0255) Table B.1 provided a breakdown of income tax/NICS and tax credit and child benefit payments for EEA nationals by country.

Please provide me with similar information for non-EEA nationals in the same format.

4. (FOI2017/0256) Table B.2 provided a breakdown of income tax/NICS and tax credit and child benefit payments for 'recently-arrived' EEA nationals by country.

Please provide me with similar information for non-EEA nationals in the same format.

5. (FOI2017/0257) Table C provided information on the fiscal contribution of recently-arrived EEA nationals excluding the top 2% of the income distribution.

Please provide me with similar information for non-EEA nationals in the same format.

6. (FOI2017/0258) On 25 August 2016, the HMRC publication "Further Statistics on EEA nationals" provided a range of information resulting from analysis of personal taxes paid and HMRC benefits received by EEA nationals. Table D provided information on the number of EEA nationals with a tax record and numbers liable at higher rate and basic rate.

Please provide me with similar information for non-EEA nationals in the same format.

Annex B

Requests submitted 20 May 2017

The first request, held under HMRC reference FOI2017/00970 was for information of the following description:

Information on the number of taxpayers and amount of income tax and NICS paid by non-EEA nationals (i.e. those who were recorded as being non-EEA nationals at time of issue of National Insurance number). Please provide the information by country of nationality (or country groupings where this would otherwise be disclosive).

The second request, held under HMRC reference FOI2017/00972 was for information of the following description:

HMRC's publication "Further Statistics on EEA Nationals" of August 2016 included information on income tax and National Insurance contributions paid by nationality and by whether 'recently arrived' in the tax year 2013/14. Please provide information in relation to EEA nationals overall and by whether 'recently arrived' in a similar format as reported for the general taxpayer population in Table 2.4 Shares of total Income Tax liability in HMRC's 'Income tax statistics and distributions' series. I should like the information in the form of an Excel spreadsheet. It has previously been acknowledged that the information is held, that it can be provided within the cost limit and that it is not disclosive and so I should be grateful for a swift response.

Annex C

Request submitted 19 July 2017

Request for information held under HMRC reference FOI2017/01314 for information of the following description:

In the circumstances, as I continue to be interested in the differences between countries, please provide information on the income and tax distribution of taxpayers from the A10 countries and the rest of the EEA by income decile on the lines of the attached spreadsheet which should be self-explanatory. Using income deciles rather than 1% and 5% percentiles at either end of the scale should mean there is no risk of disclosure even when making a distinction by country grouping and by recent arrival. As this is merely a different presentation of the data held by HMRC I should be grateful for a swift reply.