

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2019

Public Authority: HM Revenue and Customs (HMRC)
Address: 100 Parliament St
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information on investigations relating to the use of a specific scheme.
2. The Commissioner's decision is that HMRC has appropriately relied on section 44(2) – Prohibitions on disclosure, to neither confirm or deny holding the requested information.
3. The Commissioner does not require HMRC to take any steps to ensure compliance with the legislation.

Request and response

4. On 3 August 2018, the complainant wrote to HMRC and requested information in the following terms:
"There were many people on the [redacted]scheme reference[redacted]. This question asks how many people are under investigation for using this scheme and on average how long have investigations been underway for these customers."
5. HMRC responded on 4 September 2018. It stated that it was issuing a refusal notice in reliance of section 44(2).
6. Following an internal review HMRC wrote to the complainant on 10 October 2018 upholding the initial response.

Scope of the case

7. The complainant contacted the Commissioner on 10 October 2018 to complain about the way his request for information had been handled. He advised the Commissioner:

"My purpose was to understand the scale of the problem that HMRC have created here, and how long it has been affecting peoples health and welfare, as HMRC have left these problems running for more than 10 years."

8. The Commissioner considers the scope of her investigation is to determine whether HMRC appropriately applied section 44(2).

Reasons for decision

9. 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 Community obligation, or
- c) would constitute or be punishable as 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)."

10. Section 44 is a class based exemption which means if the information conforms to the class described in this section, the exemption is engaged. In this case, HMRC considers that the confirmation or denial that would have to be given falls within paragraph (a) of section 44.
11. Section 44(1)(a) of the FOIA states that information is exempt from disclosure if it is prohibited by any enactment. This is commonly known as a statutory bar to disclosure. Section 44(2) of the FOIA states that the duty to confirm or deny does not arise if the confirmation or denial is likewise prohibited by any enactment.
12. HMRC explained the following:

"Section 18(1) of the of the Commissioner's for Revenue and Customs Act 2005 (CRCA) gives HMRC a duty of confidentiality which applies to all information it holds in connection with its functions.

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."

13. The Commissioner accepts HMRC's view that the enactment that applies in this case is the CRCA. Section 18(1) of the CRCA states that HMRC officials may not disclose information which is held by HMRC in connection with one of its functions.
14. Section 23 of the CRCA further states that information prohibited from disclosure by section 18(1), is exempt by virtue of section 44(1)(a) of the FOIA if its disclosure would specify the identity of the person to whom it relates or would enable the identity of such a person to be deduced. The Commissioner notes that section 18(1) of the CRCA states that the term "person" includes legal entities such as companies.
15. In its submissions to the Commissioner, HMRC outlined that section 23(1) of the CRCA effectively requires the consideration of two questions. Firstly, HMRC state it is their duty to consider whether the requested information is held in connection with a function of HMRC. Secondly, HMRC also have to ask whether or not the information relates to a "person" who is identified, or who could be identified from the information requested.
16. The definition of information relating to a person is set out in section 19(2) CRCA as follows:

"...revenue and customs information relating to a person means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others)"
17. In respect of the first point in paragraph 15, if HMRC confirmed or denied holding the requested information it would be confirming or denying holding information held in connection with a function of HMRC.
18. The Commissioner is satisfied that confirming or denying whether the requested information is held would identify a "person", within the meaning of section 23(1) of the CRCA. This is because the request specifically refers to a scheme, therefore the information, if held, would

relate to a scheme and consequently the complainant is seeking information about a "legal" person, that "person" being the scheme.

19. Confirming or denying that the requested information is held would therefore fall within sections 18(1) and 23 of the CRCA. This is because issuing a confirmation or denial in response to a request relating to a specified person's tax affairs would inevitably reveal the identity of the person or enable their identity to be deduced by the general public. It would therefore also confirm whether HMRC holds information relevant to its functions in relation to that person. Thus, by virtue of section 44(2) of the FOIA, the duty to confirm or deny contained in section 1(1)(a) of the FOIA does not apply.
20. The Commissioner is therefore satisfied that HMRC is correct to refuse to confirm or deny whether it holds the requested information under section 44(2) of the FOIA.

Right of appeal

21. 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

22. 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.
23. 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

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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