

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2019

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

Decision (including any steps ordered)

1. The complainant has requested information about penalties levied in relation to transactions involving a specific company ("the Company"). HM Revenue and Customs (HMRC) refused to confirm or deny holding information within the scope of the request as it argued that to do so would breach another piece of legislation.
2. The Commissioner's decision is that HMRC is entitled to rely upon section 44(2) of the FOIA to neither confirm nor deny holding information within the scope of the request.
3. The Commissioner does not require any further steps.

Request and response

4. On 20 March 2019, the complainant wrote to HMRC and requested information in the following terms:

"Could you let me know of any penalties imposed on individual tax payers, and how many, relating to transactions entered into with [the Company]."

"For the avoidance of doubt, I do not want any names, just how many and the percentage of penalty."

5. HMRC responded on 17 April 2019. It refused to confirm or deny holding information within the scope of the request and it relied on section 44(2) of the FOIA to do so. It argued that confirming or denying that it held information would itself involve disclosure of information, held in relation

to one of its functions, which would identify a person. Such a disclosure would, it argued, be prohibited by section 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA).

6. Following an internal review, HMRC wrote to the complainant on 2 August 2019. It upheld its original position, but provided some further information as to why CRCA (and thus section 44(2) of the FOIA) would be engaged in relation to the request.

Scope of the case

7. The complainant contacted the Commissioner on 9 August 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers that the scope of her investigation is to determine whether HMRC is entitled to rely on section 44(2) to neither confirm nor deny holding information within the scope of the request.
9. For the avoidance of doubt, the Commissioner has not asked HMRC, during the course of her investigation, to disclose its actual position in relation to information it might hold. Therefore nothing in this decision notice should be construed as indicating that information is (or is not) held by HMRC.

Reasons for decision

10. Section 1(1) of the FOIA states that:

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.*
11. Section 44(1) of the FOIA provides an exemption from disclosure for any information whose disclosure would either be otherwise prohibited by another piece of legislation or which would constitute a contempt of court.
12. Section 44(2) of the FOIA provides an exemption from the duty to confirm or deny whether information is held if the mere act of confirming or denying alone would involve the disclosure of information which was otherwise prohibited.

13. In its initial response, HMRC noted that:

"Section 44 of the FOIA applies when the requested information, if held, would be prohibited from disclosure by another piece of legislation.

"In this instance, section 18(1) of the CRCA gives HMRC a duty of confidentiality which applies to all information it holds in connection with its functions. The prime examples of a function are the assessment and collection of tax; and the payment and management of tax credits. This is to make sure that information held on people and businesses would be protected and released only in controlled and limited circumstances.

"When deciding whether we are prohibited from releasing information under FOIA by our duty of confidentiality, CRCA section 23(1) sets the following two questions:

- Would the requested information be held in connection with a function of HMRC?*
- Would the information relate to a "person" who could be identified from the information requested?*

"The term "person" includes legal entities such as companies, trusts and charities, as well as living individuals (see Schedule 1 of the Interpretation Act 1978).

"In this case, the answers to both questions is "Yes". Our duty of confidentiality therefore applies under CRCA section 18(1) and we are exempt from releasing the information under FOIA section 44(1)(a).

"Sometimes even just confirming whether we hold the information could tell you something about this person. So FOIA section 44(2) exempts us from either confirming or denying whether we hold information."

14. The complainant disputed HMRC's use of section 44(2) to refuse to confirm or deny holding information. He argued that his request had specifically excluded "identities" and that he was only seeking a number – which, he argued, would not identify anyone. He also suggested that there was a public interest in disclosure of the information.

The Commissioner's view

15. At the outset of her investigation, HMRC confirmed to the Commissioner that, although it was not explicitly stated in either the response or the

internal review, the "person" the information (if held) would relate to and be identifiable from was the Company itself.

16. In the Commissioner's view, HMRC *would* be unable to confirm or deny holding information within the scope of the request without disclosing information about the Company.
17. The request that the complainant submitted clearly identifies the Company. The only information which HMRC held which would satisfy the request would be information about the Company as any information which did not relate to the company would not be within the scope of the request. Therefore any information would both "relate to" and, when read with the request, identify, a "person" within the meaning of the CRCA.
18. By confirming or denying it held information within the scope of the request, HMRC would be disclosing whether or not transactions involving the Company had resulted in penalties levied by HMRC. Any such information would clearly relate to a "function" of HMRC: its function in relation to the general management and collection of taxes.
19. The Commissioner is therefore satisfied that HMRC has correctly applied the two-step test set out in section 23(1) of the CRCA. Any information it held within the scope of the request, because of the way it was worded, would relate to HMRC's functions *and* would relate to a "person" who could be identified from that information (when read with the request). The disclosure of such information would thus be prohibited by section 23(1) of the CRCA and therefore section 44 of the FOIA would automatically be engaged.
20. As the mere act of confirming or denying whether information is held would, in itself, disclose such prohibited information, HMRC was entitled to neither confirm nor deny holding information within the scope of the request and has correctly relied on section 44(2) of the FOIA to do so.
21. As section 44 is an absolute exemption, the Commissioner is not required to consider the balance of public interest in providing a confirmation or a denial that information is held.

Right of appeal

22. 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

23. 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.
24. 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
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