

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2021

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

Decision (including any steps ordered)

1. The complainant has submitted two requests for information to HM Revenue & Customs ("HMRC") in relation to referrals of cases of suspected tax evasion submitted to HMRC by two organisations. HMRC refused to confirm or deny whether it held information within the scope of the requests, relying on the exemption provided under section 31(3) (law enforcement) of FOIA.
2. The Commissioner's decision is that HMRC was entitled to rely on section 31(3) FOIA as the basis for not complying with the duty to confirm or deny whether it held the requested information on both occasions.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 12 February 2020, the complainant wrote to HMRC and submitted the following requests:

Request 1

"Please could you provide the number of referrals of suspected tax evasion submitted by Nixon Williams Ltd to HMRC. Please could you provide a yearly breakdown of the number of referrals made covering the last 10 years."

Request 2

"Please could you provide the number of referrals of suspected tax evasion submitted by Durham Legal Services UK Ltd to HMRC. Please could you provide a yearly breakdown of the number of referrals made covering the last 10 years."

5. HMRC responded on 19 February 2020 to both requests. On both occasions it refused to confirm or deny holding the information requested, stating that by either confirming or denying whether it held the requested information it would breach the duty of confidentiality set out in section 18(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA). It explained that this meant it was relying on section 44(2) of FOIA, which removes the duty to confirm or deny holding the information requested if to do so would be prohibited by an enactment.
6. Remaining dissatisfied with the response received the complainant wrote back to HMRC on the same date and asked it to conduct internal reviews in relation to both requests. In these communications the complainant presented his arguments why he believed that section 44(2) of FOIA was not engaged in these cases.
7. HMRC sent him the outcomes of its internal reviews for both requests, on 12 March 2020. HMRC decided to change its position in relation to the FOIA section it relied on. HMRC stated that it had incorrectly cited section 44(2) of FOIA, but maintained the refusal to confirm or deny and at this stage cited section 31(3) of FOIA (law enforcement).

Scope of the case

8. The complainant contacted the Commissioner on 21 May 2020 to complain about the way both of his requests for information had been

handled. He challenged the application of section 31(3) of FOIA by HMRC in response to both information requests.

9. Bearing in mind that both complaints were submitted by the same complainant against the same public authority, for practical purposes the Commissioner decided to issue a single decision notice for both complaints.
10. During the course of the Commissioner's investigation, HMRC decided to change its position in relation to the first information request. HMRC stated that after further consideration its view was that both sections 31(3) and 44(2) were engaged.
11. Therefore, the following analysis considers whether HMRC correctly refused to confirm or deny whether it held information within the scope of the requests relying on the exemption provided under section 31(3) of FOIA. The Commissioner will only consider the application of section 44(2) of FOIA, if she finds that section 31(3) was not engaged.
12. For the avoidance of doubt, HMRC has not informed the Commissioner as to what information it might or might not hold in respect of the requests – nor has the Commissioner sought to establish whether relevant information is held. Nothing in this decision notice should be taken as indicating whether HMRC does or does not hold any information falling within the scope of the request.

Reasons for decision

Section 31 – Law enforcement

13. Section 31(1) of FOIA states that:

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under the Act would, or would be likely to, prejudice –

(a) *the prevention or detection of crime.*

...

(d) *the assessment or collection of any tax or duty or of any imposition of a similar nature.*

14. Section 31(3) of FOIA provides that:

The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

15. The exemption can be engaged on the basis that disclosing the information either "would" cause prejudice, or the lower threshold that disclosure "would be likely" to cause prejudice. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
16. Section 31(3) provides an exclusion from the requirement to confirm or deny whether information described in a request is held if to do so would, or would be likely to, prejudice any of the functions in section 31(1). The relevant matters in this case are those set out at section 31(1)(a); the prevention or detection of crime, and at section 31(1)(d); the assessment or collection of any tax or duty or of any imposition of a similar nature.
17. When considering a prejudice-based exemption the Commissioner will:
 - identify the applicable interests within the relevant exemption;
 - identify the nature of the prejudice and that the prejudice claimed is real, actual and of substance;
 - show that there is a causal link between disclosure and the prejudice claimed; and,
 - decide whether prejudice would or would be likely to occur.
18. HMRC's position relates to the fact that to disclose the confirmation or denial in response to the complainant's request would effectively confirm whether or not it received referrals for tax evasion from the organisations named in the requests for the specified period of time.
19. HMRC stated that like many government departments and law enforcement agencies, it relies on referrals from third parties about suspected fraud in order to initiate civil and criminal investigations. HMRC added that, as the UK's tax authority, it is its imperative to "*collect the money that pays for the UK's public services.*"
20. HMRC explained that although it exercises a proactive role in tackling tax evasion and it undertakes risk analysis on data it holds, as well as gathering information through other channels such as information

sharing gateways, it is not possible to police the entire tax system only through these channels. HMRC stated that this is "*why information provided by the public about wrongdoing is crucial.*" It added that "*Tax fraud referrals can trigger investigations into matters which might otherwise go undiscovered, as such, reports play a key role in combating all types of fraud.*"

21. Following the above, HMRC asserts that, with all the risk that reporting any kind of fraud already carries, if it would have to confirm whether specific sources had submitted referrals or allegations, it would immediately lead to unwillingness to submit such reports. HMRC stated that the "*Anonymity of the submitter is a crucial part of the fraud reporting process.*"
22. HMRC told the Commissioner that because of these reasons, in its fraud reporting guidance for the members of the public, it is made clear that all the information provided is treated with utmost confidence. HMRC explicitly ensures persons submitting referrals for fraud, whether individuals or organisations, are assured that their role in helping it uncover tax fraud will not be made public.
23. HMRC believed that confirming or denying whether the named entities in the complainant's requests submitted tax evasion referrals would discourage those organisations and others from submitting such referrals in the future. Consequently, the reduction in referrals would prejudice the HMRC's activities relevant to sections 31(1)(a) and 31(1)(d).
24. HMRC also explained to the complainant that there are also distinctions to be made with provisions of the Criminal Finances Act 2017. In particular, certain provisions do not make it mandatory for private entities to self-report to HMRC, rather a self-report may be made by a private entity where it considers that it has failed to prevent a person associated with the relevant body/private entity from facilitating tax evasion. Such a report would not be concerned with their client's tax evasion but rather the relevant entity's failure to prevent an act of criminal facilitation of tax evasion. In addition, HMRC referred to other legislation which may have been of interest to the complainant such as the Proceeds of Crime Act 2002 and obligations to disclose money laundering. However, such reports are to be made to the National Crime Agency (NCA) and not HMRC and if HMRC receives referrals from the NCA then HMRC's position was that such information would be exempt from disclosure under section 23 of FOIA.

25. On the other hand, the complainant argued that the requests merely asked for a series of numbers. He stated that *"It is non-sensical to suggest that providing a series of numbers would either prevent the detection of a crime or the assessment or collection of any tax or duty or any imposition of a similar nature."*
26. The Commissioner accepts that the reasoning from HMRC is sound. It is reasonable for HMRC to state that the guarantee of confidentiality is key to third parties being willing to make referrals to it, and it is the case that disclosing the confirmation or denial in this case would breach that confidentiality. The Commissioner further accepts that this failure to maintain confidentiality would discourage referrals in future, both from the organisations named in the request and from others. Whilst the complainant in his reasoning has focussed on his request being for numerical information, this has no bearing on the fact that confirmation or denial in response to this request would reveal whether or not the organisations named in the request had made referrals to HMRC.
27. As to whether discouraging referrals would be likely to result in prejudice relevant to sections 31(1)(a) and (d), the Commissioner accepts that reducing the number of referrals made to it would be likely harm the ability of HMRC to carry out its role, and that the nature of HMRC's role means that this would in turn be likely to result in prejudice relevant to the prevention or detection of crime and the assessment or collection of any tax or duty or of any imposition of a similar nature.
28. In light of the above, the Commissioner has concluded that section 31(3) is engaged.

The public interest test

29. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying.

Public interest arguments in favour of confirming or denying

30. The complainant stated that his requests for information were related to an accountancy firm and a law firm. He added that *"Unlike individuals, these are both subject to the Criminal Finances Act 2017 legislation and supporting guidance 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion.'" The complainant argued that "the existence of the legislation balances the public interest test the other way in that the public have a right to know that these firms are following their statutory duty under the Criminal Finances Act 2017."*

31. HMRC appreciates that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. It also acknowledged the importance of the public having confidence in those public authorities tasked with upholding the law. However, HMRC stated that it meets this public interest by publishing quarterly performance reports that *"contain data such as compliance cases opened and closed; criminal investigations closed; prosecutions; and positive charging decisions. And importantly, they contain figures for allegations received via our fraud hotline channels."*

Public interest arguments in favour of maintaining the exemption

32. In favour of neither confirming or denying, HMRC stated that there is a significant public interest in safeguarding the supply of information from confidential sources. It added *"Our referral process makes clear information provided will be kept confidential. Anything that threatens to prevent information providers from co-operating with public authorities is not in the public interest."*
33. HMRC asserted that, through its fraud hotline, it receives thousands of allegations which subsequently may lead to investigations that improves its performance and effectively discharge its functions. HMRC stated that *"The need to maintain the voluntary supply of information that helps us tackle tax fraud is very much in the public interest. These providers would have an expectation that their identities would be kept confidential, given that they are alleging wrongdoing."*
34. HMRC acknowledges that it is in the public interest to demonstrate that its investigations are fair and transparent. It added *"We will share anything we rely on to prove wrongdoing, but it is categorically not in the public interest to reveal the source of the initial allegation."*

Balance of the public interest

35. While the Commissioner accepts that the complainant may have personal reasons for wanting access to the requested information, the exclusion at section 31(3) is subject to the public interest test set out in section 2(1)(b) of the FOIA. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny in section 31(3) outweighs the public interest in confirming or denying whether HMRC held information within the scope of the request.
36. The Commissioner agrees that there is a public interest in transparency of HMRC's investigations and the sources of the information it receives, as well as holding HMRC accountable about its activities in discharging

its duties. However, there is also a significant public interest in protecting the supply of information from confidential sources. This is in line with the purpose of section 31 of FOIA, which is to prevent prejudice to a range of law enforcement related activities and so the public interest in maintaining the exemption must be very strong in such a case.

37. The Commissioner notes that the complainant's arguments were built on the premise that it is in the public interest to have access to the requested information because in this way the public will increase its confidence that tax evasion cases are being reported and accordingly investigated by HMRC. Also, the complainant argued that there shouldn't be a difference in treatment and instead all cases reported whether by public organisation or private entities should be disclosed. The complainant also referred to how under the Criminal Finances Act 2017 it is compulsory for companies to report any of their clients that they suspect are committing tax evasion.
38. On the other hand, the Commissioner notes that HMRC explained that there is an expectation of anonymity by those who provide certain types of intelligence. Where information is not provided under a legal gateway, HMRC will protect the source by neither confirming nor denying whether the information is held. Information provided by private entities and individuals falls within this category and there is a public interest in not disclosing confidential intelligence provided because this may discourage those entities or individuals from coming forward with such information. Further, the public interest is better served by having access to this information so matters referred to the HMRC can be investigated. Having considered the complainant's arguments and those made by HMRC, the Commissioner's view is that on balance the public interest is better served by maintaining the exemption for the following reasons:
 - HMRC is clear to companies and individuals that information reported to it is provided on a confidential basis;
 - the legal framework provides gateways for the public sector to report information to HMRC which is reported quarterly, however, the same gateways are not available to private entities/individuals;
 - reporting on information received from private entities/individuals or confirming whether there have been a number of reports within a specified period results in confidentiality being lost;
 - HMRC is reliant on private entities/individuals bringing matters to its attention so that it can carry out its duties.

39. On that basis, the Commissioner accepts that, in all the circumstances of the case, the public interest arguments in favour of maintaining the refusal to either confirm or deny whether information is held outweigh those in favour of HMRC issuing such a confirmation or denial.
40. HMRC was therefore entitled to refuse to comply with the duty set out in section 1(1)(a) on the basis of the exclusion in section 31(3).
41. As the Commissioner has upheld the citing of section 31(3), she did not deem it necessary to consider the application of section 44(1)(a) of FOIA.

Right of appeal

42. 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

43. 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.
44. 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

Ben Tomes
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