

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 25 February 2008**

**Public Authority:** Her Majesty's Revenue and Customs ('HMRC')  
**Address:** 4th Floor  
100 Parliament Street  
London  
SW1A 2BQ

### Summary

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The complainant requested part of HMRC's internal guidance on processing tax returns submitted by self-assessment taxpayers under the construction industry scheme. HMRC refused to provide a particular section of this guidance because it considered it to be exempt from disclosure on the basis of section 31(1)(d) (assessment or collection of any tax or duty). Having reviewed the withheld information the Commissioner has decided that HMRC appropriately relied upon section 31 when refusing to supply the information. However, the Commissioner has also concluded that HMRC breached section 17 by failing to provide the complainant with an adequate refusal notice within 20 working days of his request.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant had been in discussions with HMRC about its internal guidance to staff involved in processing 2002/03 self assessment ('SA') tax returns for sometime. The Commissioner understands that during the course of this correspondence HMRC provided the complainant with some sections of the guidance, but not others. Consequently, the complainant submitted the following request to HMRC on 31 May 2006:

*'The guidance enclosed with your letter of 26 May is useless to me, because you have withheld the section on the entry for CIS [Construction Industry Scheme] tax in box 3.97 which is the main point of interest. I would therefore like to make a formal application for disclosure of that guidance under the Freedom of Information 2000'.*

3. HMRC acknowledged receipt of the complainant's letter on 6 June 2006.
4. However, HMRC did not provide the complainant with a substantive response to his request until 21 September 2006. In this response HMRC explained that it had concluded that the requested information was exempt by virtue of the exemption contained at section 31(1)(d) of the Act - disclosure would, or would be likely to, prejudice 'the assessment or collection of any tax or duty or of any imposition of a similar nature'. HMRC's response did not make any reference to how it had concluded that the public interest favoured withholding the requested information.
5. The complainant wrote to HMRC on 25 September 2006 and asked it to complete an internal review into its decision to withhold the requested information. The complainant noted that the refusal notice of 21 September 2006 had not provided any reasoned arguments as to why the particular information he had requested was exempt under section 31(1)(d) of the Act.
6. On 16 October 2006 HMRC wrote to the complainant and informed him that it remained of the view that the requested information was exempt from disclosure by virtue of section 31(1)(d).

## The Investigation

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### Scope of the case

7. The complainant contacted the Commissioner on 19 October 2006 and asked him to investigate HMRC's decision to withhold the information he requested.

### Chronology

8. The Commissioner wrote to HMRC on 15 November 2007 in order to discuss its handling of this request. The Commissioner specifically asked to be provided with a copy of the requested information. The Commissioner also asked HMRC to provide a detailed explanation of why it believed that disclosure of the requested information would, or would be likely to, prejudice the assessment or collection of any tax or duty. In addition, the Commissioner asked HMRC to provide an explanation of the public interest factors it had considered in this case and why it had concluded that the public interest favoured withholding this information.
9. HMRC responded to the Commissioner on 17 December 2007 and provided the Commissioner with a copy of the requested information. HMRC also provided the Commissioner with a detailed explanation of why it considered that disclosure of the requested information would be likely to prejudice its ability to assess or

collect a tax or duty. HMRC also explained to the Commissioner the public interest factors it had taken into consideration in respect of this request and why it had concluded that the public interest favoured withholding the information.

## Findings of fact

10. Before considering HMRC's application of the exemption contained at section 31 of the Act, the Commissioner believes that it would be useful to briefly provide some background information about the SA tax process, and in particular, the aspect of the SA process that this request focuses on, namely the CIS.
11. The SA method of collecting income tax was introduced in 1996 for taxpayers with a number of sources of income and less straightforward financial affairs. Under the SA system, taxpayers are required to complete returns to establish how much income tax they should pay and to provide HMRC with the information it needs to validate this calculation.
12. The SA tax return includes an additional section for taxpayers who are self employed and box 3.97 of this additional section is completed by subcontractors working in the construction industry. In some cases, subcontractors may have already suffered deductions in tax in respect of their earnings because contractors are required to deduct certain amounts of tax depending on the employment status of the subcontractor. When this happens the subcontractor will usually receive a CIS25 voucher from the contractor which records the amount of earnings and the amount of tax that has been deducted.
13. On the SA tax return, a subcontractor can complete box 3.97 to show the amount of tax that has already been deducted from their income. The amount shown in this box would then be deducted from the subcontractor's overall tax bill since it has already been paid. In some cases, where a subcontractor has only had intermittent employment throughout the year, they may be due a tax repayment because the tax deducted by the contractor will be set at a rate as if the subcontractor was in continuous employment. Alternatively, in other cases the subcontractor may have to pay further tax.
14. HMRC therefore uses the information contained in box 3.97 to determine the outstanding tax liability of each subcontractor and whether in fact a repayment is due. Subcontractors are required to provide copies of the CIS25 vouchers they have received from contractors to HMRC to support their claim that tax has already been paid.

## Analysis

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### Procedural matters

#### Section 17

15. Section 17 of the Act states that when refusing to provide information covered by the scope of a request, public authorities must provide the applicant with a refusal notice. The Act sets out a number of points that a refusal notice must contain, for example an explanation of why the requested information has not been disclosed and the applicant's right to complain to the Commissioner. In line with the time for compliance with a request set out at section 10 of the Act, such a refusal notice must be issued within 20 working days following the public authority's receipt of a request.
16. In this case the complainant submitted his request on 31 May 2006 and although HMRC acknowledged receipt of his request on 6 June 2006, it did not provide the complainant with a substantive response to his request until 21 September 2006. Therefore, the Commissioner has concluded that HMRC breached section 17(1) of the Act.
17. Section 17(3) specifically states that when relying on a qualified exemption (such as section 31) to withhold information, a public authority must clearly state the public interest factors it has considered and why it has included that the public interest favoured withholding the information. As HMRC failed to make any reference to its public interest considerations in the refusal notice of 21 September 2006, the Commissioner has concluded that also HMRC breached section 17(3) of the Act.

### Exemptions

#### Section 31- Law Enforcement

18. Section 31 is a prejudice based exemption and therefore to engage the exemption HMRC must demonstrate that disclosure would, or would be likely to, prejudice the collection of any tax or duty.
19. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner [EA2005/0005]* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). This interpretation followed the judgment of Mr Justice Mundy in *R (on the application of Lord) v Secretary of State for the Home Office [2003]*. In this case the Court concluded that 'likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not'. With regard to the alternative

limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner [EA2005/0026, EA2005/0030]* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

20. In this particular case because of the nature of the information withheld by HMRC, the Commissioner considers that it is not possible for him to comment in great detail on HMRC's reliance on section 31 because to do so may reveal details of the withheld information.
21. The complainant has argued that disclosure of the requested information would not harm HMRC's ability to collect income tax because the figure that subcontractors enter into box 3.97 is beyond their control. This is because when a contractor makes a deduction he prepares a CIS25 voucher and forwards part one of the voucher to HMRC, gives the subcontractor part two of the voucher and retains part three of the voucher. Therefore, the complainant has argued that HMRC is able to check the copies of the CIS25 vouchers submitted by the complainant with the copies of the CIS25 vouchers submitted by the contractor in order to verify whether the figure that the subcontractor has entered in box 3.97 is correct.
22. The Commissioner accepts that this is a reasonable conclusion to come to given the facts that are in the public domain. However, having reviewed the requested information, and considered the arguments advanced by HMRC, the Commissioner is satisfied that disclosure of the information would, or would be likely to, harm HMRC's ability to collect income tax. This is because the requested information would provide fraudulent taxpayers with a clear method of how they could alter the information they provide HMRC in order to ensure that their tax liability was assessed as lower than the actual amount due, or in some cases, to ensure that a repayment was made when in fact no tax had actually been paid. For the reasons noted in paragraph 21, the Commissioner is not able to provide further details in this notice about how this prejudice may occur because to do so may reveal the nature of the withheld information.
23. In assessing the likelihood of harm occurring if the requested information was disclosed, the Commissioner has taken into account a number of factors:
24. The Commissioner understands that there are currently 2.8m taxpayers who complete the additional self employment section under SA and of those 600,000 have deductions made under CIS and would therefore complete box 3.97 on the SA form.
25. Clearly, the Commissioner is not suggesting that all taxpayers who pay their income tax through SA and are covered by the CIS scheme may consider using the requested information to avoid paying the correct amount of tax. However, given the significant numbers of taxpayers who are covered by the CIS system, the Commissioner considers the likelihood of harm to be relatively high given the amount of taxpayers who could potentially alter their tax returns.

26. The Commissioner has established that there is clear evidence that organised criminal gangs have systematically targeted HMRC's SA process in attempts to fraudulently claiming millions of pounds in repayments. (<http://www.accountancyage.com/accountancyage/news/2194531/crime-gangs-attack-self>). Furthermore, in one particular case, fraudsters targeted the CIS aspect of the SA tax system which resulted in an estimated £4.6m tax loss. ([http://www.tax-news.com/archive/story/HMRC Victorious In Construction Industry Tax Fraud Case xxxx26240.html](http://www.tax-news.com/archive/story/HMRC_Victorious_In_Construction_Industry_Tax_Fraud_Case_xxxx26240.html)).
27. Additionally, the Commissioner believes that the requested information could also be used by opportunistic individual taxpayers to adjust the information they supply to HMRC in an attempt to pay less tax.
28. Finally, although the guidance requested by the complainant related to the SA tax returns for the financial year 2002/03, the Commissioner understands that this guidance has been used for all subsequent years and is still current despite the modifications HMRC's introduced to the CIS in April 2007.
29. On the basis of the above the Commissioner is satisfied that the likelihood of HMRC's ability to collect tax being prejudiced following disclosure of the requested information is one that can be accurately described as 'real and significant'. Furthermore, the Commissioner believes that given the clear tax evasion methods that the requested information would identify to taxpayers, he has concluded that the likelihood of harm is one that can be correctly described as one that 'would' occur, rather than one that would simply be 'likely to' occur.
30. Section 31 is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that information is exempt information where the public interest, in all the circumstances of the case, in maintaining the exemption outweighs the public interest in disclosing that information

#### Public interest factors in favour of disclosure

31. The Commissioner acknowledges that there is strong public interest in HMRC being accountable for its decisions and that it is as transparent as possible about the ways in which it makes those decisions. Disclosure of the withheld information would provide the public with further details of how HMRC processes SA tax forms from those taxpayers covered by the CIS. This would reassure the public, and in particular, CIS taxpayers that the processes and procedures HMRC uses to assess their tax liability are fair and honest. The Commissioner accepts that as a result public confidence in HMRC's ability to collect tax in an honest and fair manner would be increased. A result of this increased confidence could be increased payments and compliance.
32. The Commissioner also believes that there is a public interest in enabling debate about the way HMRC collects income tax, particularly through SA, and such a debate could improve the quality of decisions made by HMRC. The Commissioner considers that this argument is particularly relevant in light of the

National Audit Office's ('NAO') review of HMRC Accounts for 2006-07. The NAO's review was critical of HMRC processes which may have led HMRC being susceptible to frauds related to SA: 'A lack of formalised accountabilities has historically made it difficult for the Department [HMRC] to establish central oversight and responsibility over repayments, including the extent to which agreed controls were being operated. Deficiencies in management information have also made it difficult to establish the degree to which these controls could prevent or detect error and irregularities'. Disclosure of the requested information could be used by the public to scrutinise the systems HMRC has in place and help buttress high standards of performance and governance at HMRC.

33. Furthermore, as the Commissioner noted above, HMRC introduced a number of modifications to the CIS in April 2007 (see paragraph 29). However, the Commissioner understands that there was concern within the construction industry that firms were not sufficiently prepared to deal with the range of changes that the new system would introduce and that this was due in part by HMRC's failure to issue documents detailing how the system will operate. (Source: <http://www.kpmg.co.uk/news/detail.cfm?pr=2802>). Disclosure of the requested information at the time of the complainant's request in May 2006 could have, to some extent, offset this lack of information about the CIS and ensured that both contractors and subcontractors were better prepared for the introduction of the new system.
34. The Commissioner believes that there is a public interest in people being able to challenge decisions made by public authorities which affect them from an informed standpoint. If the withheld information was disclosed this may assist SA taxpayers to better understand how HMRC had decided they were liable for a particular level of tax under the CIS, or indeed why they have not been granted a tax repayment. Such taxpayers would be then be able challenge HMRC's decision with regard to their tax liability from an informed standpoint.

#### Public interest factors in favour of withholding

35. The Commissioner acknowledges that the arguments surrounding accountability and transparency have considerable weight in principle. However, in this case the Commissioner believes that there are a number of mitigating factors which limit the strength of the arguments outlined above.
36. Firstly, the Commissioner has established that despite the criticism cited in paragraph 33, HMRC already publishes a substantial amount of information about the CIS (See <http://www.hmrc.gov.uk/new-cis/index.htm>). These disclosures include detailed guidance for both contractors and subcontractors which is designed to provide comprehensive information and assistance about all aspects of the CIS. Furthermore, HMRC also publishes on its website its internal guidance used by its employees to process the CIS tax returns with sections only redacted or not published where HMRC considers the information to be exempt from disclosure under the Act (e.g. the withheld information about box 3.97 in this case). Having had the opportunity to review the requested information, the Commissioner does not believe that this information would provide contractors or

subcontractors with a greater understanding of the obligations under the new form of the CIS.

37. Furthermore, the Commissioner believes that the argument that disclosure of the requested information would ensure that HMRC was accountable for the decisions it takes is mitigated, to some degree, by external audit procedures that HMRC is already subject to. For example, as mentioned above, the NAO audits HMRC's annual accounts in order to ascertain that adequate regulations and procedures have been framed to secure an effective check on the assessment, collection and proper allocation of revenue.
38. The Commissioner also recognises the importance to the public interest of being able to make informed challenges to decisions made by public authorities. However, should HMRC and the taxpayer disagree about the level of tax liability based on the information supplied by the taxpayer, HMRC has an internal complaints procedure for dealing with such matters. Should taxpayers be dissatisfied with HMRC's handling of their complaint, they have the right to complain to The Adjudicator's Office which will investigate whether HMRC has failed to handle their tax affairs fairly and consistently and in line with its own practices. Furthermore, taxpayers also have the right to complain to the Finance and Tax Tribunal which deals with appeals against assessments and amendments to SA made by HMRC.
39. Consequently, the Commissioner believes that a number of the public interest arguments in favour of disclosure of the withheld information are weakened on the basis of the above points.
40. Furthermore, the Commissioner accepts that there is a very strong public interest in HMRC being able to collect the correct amount of tax due to the Exchequer in order to support public services. Clearly, if disclosure of the withheld information resulted in less income tax being collected by HMRC, over time there would be less money available for the Government of the day to spend on public services. Moreover, tax evasion or fraudulent claims ultimately means that a greater tax burden falls unfairly on honest, compliant taxpayers.
41. The Commissioner also recognises that there is a public interest in HMRC collecting tax at the least cost to the public purse. Clearly, the less money HMRC has to expend in order to collect the correct amount of tax due to the Exchequer will obviously leave further public funds to be spend on the delivery of public services. Furthermore, the Commissioner accepts that it will benefit the public if HMRC can process SA tax returns with the minimum level of burden to honest taxpayers. The Commissioner accepts that if the withheld information were disclosed HMRC may have to adjust its methods of processing SA tax returns in order to ensure that the CIS aspect of SA was secure and that this could make the SA collection process not only lengthier, but also more costly.
42. Finally the Commissioner accepts that there is a public interest in the behaviour of compliant, honest taxpayers not being undermined by the actions of the dishonest or fraudulent taxpayers. If the withheld information makes it easier for dishonest SA taxpayers to pay less income tax, honest taxpayers' confidence in



HMRC collecting tax in a fair and equitable way could be undermined. This could damage the general climate of business honesty upon which the economy depends, i.e. individuals are prepared to pay the tax that they are liable for because they believe that all other taxpayers will voluntarily pay, or be forced to pay by HMRC, the tax to which they are liable. The Commissioner accepts that this argument is particularly relevant given that the method of collecting tax in this case is that of SA, which obviously relies on taxpayers honestly declaring their tax returns.

43. Having weighed the public interest arguments for both disclosing and withholding the information, the Commissioner has concluded that in this case the public interest is weighed in favour of not disclosing the withheld information. In reaching this conclusion, the Commissioner has been particularly persuaded by the very strong public interest in HMRC being able to collect taxes which are due to the Exchequer in the cheapest and easiest way in order to ensure that Government has sufficient funds to fund the delivery of public services. Although the Commissioner acknowledges that there were concerns in the construction industry that HMRC had not provided sufficient information prior to the introduction of the new CIS in April 2007, he does not believe that disclosure of the requested information would have added to contractors or subcontractors overall understanding of their obligations under the CIS.

## The Decision

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44. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- HMRC were correct to refuse to disclose the requested information on the basis that it was exempt by section 31(1)(d) of the Act.
45. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- By failing to respond to issue a refusal notice within 20 working days of the receipt of the request HMRC breached section 17(1) of the Act.
  - By failing to explain in the refusal notice the public interest arguments it had considered, HMRC breached section 17(3) of the Act.

## Steps Required

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46. The Commissioner requires no steps to be taken.

## Right of Appeal

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47. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 25<sup>th</sup> day of February 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

**Section 1(1)** provides 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.”

**Section 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 2(1)** provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

**Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 17(3)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

**Section 31(1)** provides that –

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

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”