

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 10 June 2009

**Public Authority:** HM Revenue & Customs (HMRC)  
**Address:** 1 Parliament Street  
London  
SW1A 2BQ

### Summary

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The complainant requested information relating to an attempted fraud case in his name, and relating to fraud committed against Home Office employees. HMRC provided some information to the complainant but refused to disclose the information specific to the attempted tax fraud in the complainant's name, citing section 30(1)(a)(i) and (ii) and section 40 of the Act. Following the Commissioner's intervention HMRC withdrew its reliance on section 30 and clarified its reliance instead on section 40(1) of the Act. HMRC considered the request as a subject access request under the Data Protection Act, and disclosed all details it held to the complainant with the exception of the address used in the attempted tax fraud.

The Commissioner finds that HMRC breached section 1(1)(a) of the Act in that it initially confirmed that it held information which it did not in fact hold, and section 10(1) by failing to respond within the required time frame in relation to one of the requests. The Commissioner also finds that HMRC breached section 17(1) by failing to provide full details of the exemptions applied within the statutory time limit. HMRC also breached section 17(1)(b) of the Act in that it claimed reliance on section 40(1) of the Act during the investigation but had failed to communicate this to the complainant, and section 17(3)(b) by failing to fully explain its assessment of the public interest test in relation to section 30.

The Commissioner finds the exemption under section 40(1) applies to the information held, but has not made a decision in relation to the subject access request as this is beyond the scope of the Act.

### 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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### Request 1

2. Following notification of an attempted tax credit fraud in his name, on 18 October 2006 the complainant wrote to HMRC requesting the following details:
  - (a) *"The bank account used to claim used to claim tax credit;*
  - (b) *ID used to open the bank account;*
  - (c) *The reason for the delay of 2 months in notifying me of the fraud.*
  - (d) *I should be grateful for your conclusions as to the source of the data"*

### Request 2

3. Not having a received a reply to his letter, the complainant sent a further letter dated 8 November 2006 asking for the following additional information:
  - (a) *"All particulars and correspondence relating to the application for tax credit made in my name;*
  - (b) *Total number of all identified current and past Home Office employees whose identities have been compromised;*
  - (c) *Total number of organised payroll frauds identified within the last three years, the number of individual employees affected, the total amount of benefit paid out, and the total recovered;*
  - (d) *A copy of your fraud prosecution policy."*
4. HMRC replied to the complainant on 6 December 2006, treating the letter of 8 November as the first request for information under the Act but also acknowledging the letter of 18 October. The letter disclosed information in respect of Request 1(c) and (d) and Request 2 (b),(c) and (d), but withheld the information asked for in Request 1(a) and (b) and Request 2(a). HMRC cited the Data Protection Act (the DPA) and sections 30(1)(a)(i) and (ii) and 30(1)(b) of the Act in relation to the withheld information.
5. The complainant requested an internal review on 8 January 2007, stating that HMRC's letter of 6 December 2006 contradicted information given in previous communications that no further action was being taken in relation to the fraudulent tax claim made using his identity.
6. The complainant questioned HMRC's reliance on section 30 of the Act since it appeared to him that the case was being treated as a routine attempted fraud and dealt with administratively. The complainant added that HMRC's refusal to release information which could resolve huge potential difficulties in his personal tax and National Insurance affairs should be viewed in relation to section 16 of the Act (which relates to a public authority's obligation to provide advice and assistance).

7. The outcome of HMRC's internal review was sent to the complainant in a letter dated 28 February 2007. The letter confirmed that the only information which had been withheld was:

*"...for all particulars and correspondence relating to the application for tax credit made in your name."*

8. HMRC confirmed that it held this information but stated that it was exempt under sections 30(1)(a)(i) and (ii) of the Act. The letter went on to explain that:

*"...it is normal practice for HMRC not to confirm whether action is being taken to investigate potentially fraudulent claims, as to do so may itself compromise any investigation or action we are taking."*

9. The letter also confirmed that there was an ongoing investigation into the fraudulent application made in the complainant's name and criminal offences had not been ruled out.
10. Additionally, HMRC also cited sections 40(2) and 40(3)(a)(i) of the Act explaining that whilst some of the information contained the complainant's details, it also contained the personal information of other individuals. HMRC were of the view that it would be unfair to disclose this information and would therefore breach the first data protection principle.

## **The Investigation**

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### **Scope of the case**

11. On 19 March 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether HMRC's application of the section 30 exemption was correct and to clarify the confusion regarding whether or not there was a criminal investigation underway regarding this particular case of attempted tax credit fraud.

### **Chronology**

12. On 2 July 2008 the Commissioner contacted HMRC requesting a copy of all withheld information and seeking further information in respect of its use of both sections 30(1)(a)(i) and (ii) and 40(2) of the Act.
13. HMRC was also asked to consider the extent to which the withheld information relates to the complainant's own personal information (section 40(1)) since disclosure of this information would technically be into the public domain.
14. HMRC contacted the Commissioner on 29 July 2008 to request an extension for providing the information requested. It was given an extension to 14 August 2008.

15. On 22 August 2008 HMRC responded to the Commissioner's request for information clarifying the issues raised and attaching a copy of a letter it had sent to the complainant of the same date.
16. In respect of section 30(1)(i) and (ii) HMRC confirmed to the complainant that:

*“Notwithstanding the fact that our response dated 28 February 2007 informed you that the case was the subject of an investigation, I can find no record of such investigation having been carried out and it appears that the case was resolved administratively.”*
17. HMRC also confirmed to the Commissioner that the withheld information constituted the personal information of the complainant, citing the section 40(1) exemption of the Act. It concluded that it had handled the complainant's requests for information incorrectly and confirmed that it had now treated the complainant's request as a subject access request under section 7 of the DPA. HMRC agreed to release all of the withheld information at requests 1(a) and 2(a) to the complainant, except for the address used in the fraudulent claim. It also confirmed that it did not hold the information at request 1(b).
18. HMRC explained that the address could be considered personal information of both the complainant, (as it was processed in connection with his tax credit record) and the personal information of the individual or individuals who live at that address. HMRC advised that, in accordance with section 7(4) of the DPA, it could not, therefore, comply with the request without disclosing information relating to the other individual(s).
19. On 12 September 2008 the Commissioner contacted HMRC in respect of its original application of the section 30(1)(i) and (ii) exemptions. The Commissioner sought clarification regarding the complainant's assertion that he had been informed on four separate occasions by four different individuals that there was an ongoing investigation into the attempted tax fraud in his name.
20. On 23 September 2008 HMRC advised the Commissioner that it had now spoken with those involved, and had ascertained that a member of the Claimant Compliance team alerted a contact in an Investigation team to [the complainant's] claim that several Home Office employees had been the subject of identity fraud. HMRC advised the Commissioner that it did not in fact hold any record of this communication, and that it had incorrectly advised the complainant in this regard. As there was no ongoing investigation HMRC was now dropping its reliance on the section 30 exemption.

## Analysis

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### Procedural matters

#### Section 1: general right of access

21. Section 1(1) of the Act sets out the general right of access to information held by public authorities:

*“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 this is the case, to have that information communicated to him.”*

22. By informing the complainant that an investigation into the tax credit fraud was ongoing HMRC confirmed the existence of information which it did not in fact hold. Therefore the Commissioner finds that HMRC breached section 1(1)(a) of the Act in wrongly advising that it held information. Additionally, HMRC failed to confirm that it did not actually hold the ID information (request 1b) used to open the bank account until after the involvement of the Commissioner, a further breach of section 1(1)(a).

#### Section 10(1): time for compliance

23. Section 10(1) of the Act states that any public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt of the request.
24. HMRC did not respond to the complainant's request of 18 October 2006 (Request 1) until 6 December 2006. Therefore the Commissioner is satisfied that HMRC breached section 10(1) in that it failed to respond within the statutory time limit.

#### Section 17: refusal notice

25. Any public authority wishing to refuse a request for information must do so in compliance with the requirements of section 17 of the Act. Section 17(1) requires a public authority to provide the applicant with a refusal notice that states that information is being withheld, specifies the exemption in question and (if necessary) explains why the exemption applies. This notice must be issued within the time for complying with section 1(1) – that is, 20 working days.
26. HMRC did not respond to the complainant's request of 18 October 2006 (Request 1) until 6 December 2006. In its failure to issue a refusal notice within the required 20 working days, HMRC therefore breached section 17(1) of the Act.
27. The refusal notice cited sections 30(1)(a)(i) and (ii) and 30(1)(b) of the Act.

Section 30 is a qualified exemption and therefore subject to the public interest test. HMRC made no reference to the public interest test in its refusal notice and gave an insufficient explanation of it in its internal review. In failing to adequately explain why the public interest favoured the maintenance of the exemption, the public authority breached section 17(3)(b) of the Act.

28. HMRC only claimed reliance on the exemption under section 40(1) of the Act during the Commissioner's investigation and therefore breached section 17(1)(b) in that it did not communicate this to the complainant.

## Exemptions

### Section 30: investigations

29. HMRC originally cited section 30 which relates to investigations and proceedings conducted by public authorities. It subsequently accepted there was no criminal investigation and therefore dropped its reliance on section 30. As HMRC has withdrawn its reliance on section 30, the Commissioner is not required to make a decision in relation to this exemption.

### Section 40: personal data

30. HMRC cited sections 40(2) and 40(3)(a)(i) at the internal review stage, however as a result of the Commissioner's intervention it later withdrew this claim and reconsidered the request under section 7 of the DPA. This meant that HMRC exempted the information under section 40(1) of the Act as it considered it to be personal data of the complainant. Under the DPA, HMRC disclosed all the information it held to the complainant with the exception of the address used in the attempted tax credit fraud.

### Section 40(1)

31. Section 40(1) provides an exemption from disclosure under the Act where the requested information is personal data of the applicant. "Personal data" is defined at section 1(1) of the DPA:

*"personal data" means data which relate to a living individual who can be identified-*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

32. The requested information includes an application form for a tax credit claim for the financial year from 2006 to 2007. The complainant's details were used on the

form in conjunction with the address in question. The Commissioner is satisfied that the form constitutes the personal information of the complainant as it has been completed in his name and includes key personal details about him.

33. In his consideration of whether the address used in the attempted tax credit fraud also constitutes personal data, the Commissioner has considered his own guidance on what constitutes personal information. The Commissioner is also assisted by the Information Tribunal's view in the case of England & L B of Bexley v. Information Commissioner (EA/2006/0060 & 0066), in which the Tribunal had considered whether an address can be personal data:

*"In our view this information amounts to personal data because it says various things about the owner. It says that they are the owner of the property and therefore have a substantial asset... The key point is that it says something about somebody's private life and is biographically significant"*

34. The Tribunal went on to say that the important point to consider was the meaning the data may have in the context of the individual's private life:

*"Does the fact that Mr X owns a property potentially worth several thousand of pounds say something about Mr X. In our view it does, and the owner is the focus of that information."*

35. The logical conclusion from this rationale would be that the addresses of all properties owned by an individual will be personal data. It should also be noted that where an individual is the landlord of a rented house, the address of that property is likely to be both personal data of the landlord and tenant.

36. In this particular case therefore, HMRC has accepted that the address in question is the personal information of both the owners or tenants of the property and the complainant on the basis that it was processed in connection with the latter's tax credit record.

37. In determining whether HMRC was correct to consider the request under section 40(1) as opposed to section 40(2) of the Act, the Commissioner has considered the Information Tribunal's decision in the case of Fenney v. Information Commissioner (EA/2008/0001), which was concerned with multiple data subjects. In this particular case, the complainant had been engaged in long running correspondence with the Avon & Somerset Constabulary relating to the investigation of various allegations against him and of complaints he made about certain police officers.

38. The police refused the requests under section 40(1) of the Act where it was the complainant's personal data. The Commissioner agreed this was correct. On appeal, the complainant argued that the police complaint file could not be his personal data as the police officers were the 'principal data subjects'. The Tribunal rejected this argument stating:



*“... There is no basis for arguing that the DPA intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is the one whose data is more extensive or significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the more significant and to then recognise the rights to protection of that individual and ignore any others. It's obligations are set out in section 7(4) and 7(6) DPA, which require it to consider whether the information requested includes information relating to a third party and, if it does, to disclose only if that third party consents or it is reasonable in the all the circumstances (by reference to the particulars matters identified in subsection (6)) to comply with the request without his or her consent.”*

39. The Commissioner therefore considers that where information constitutes the personal data of both the applicant and a third party, and the data is inextricably linked as in the case of Fenney, section 40(1) will apply. In the present case, the Commissioner is satisfied that the withheld information constitutes the data of both the complainant and a third party and by its very nature, the details are inextricably linked. Accordingly, the Commissioner has concluded that section 40(1) applies to the information as opposed to sections 40(2) and 40(3)(a)(i). It is not however within the scope of the Act, for the Commissioner to determine whether or not the public authority's application of section 7(4) and 7(6) of the DPA was correct.
40. The complainant has been made aware of his right to ask the Commissioner to conduct an assessment under section 42 of the DPA to determine whether or not he has any right of access to the information withheld under that Act, by virtue of the application of section 40(1).

## The Decision

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41. The Commissioner's decision is that HMRC did not deal with the request for information in accordance with Part 1 of the Act in the following respects:
- Section 1(1)(a) in that it incorrectly advised that it held information which it did not in fact hold
  - Section 10(1) in that it failed to confirm that it held information within the statutory time limit
  - Section 17(1) in that it failed to provide a refusal notice within the specified time
  - Section 17(1)(b) in that it did not communicate to the complainant its reliance on section 40(1).
  - Section 17(3)(b) in that it did not communicate its assessment of the public interest test to the complainant in the refusal notice and gave an inadequate explanation in the outcome of the internal review.



42. However, the Commissioner finds that HMRC correctly applied the exemption at section 40(1) of the Act, albeit only after his intervention.

### **Steps Required**

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- 43 The Commissioner requires no steps to be taken.

## Right of Appeal

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44. 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 10<sup>th</sup> day of June 2009**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex: Relevant statutory obligations

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1. **Section 1(1)** provides that:

- (1) 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.

2. **Section 10** provides that:

- (1) ... a public authority must comply with section (1)(1) promptly and in any event not later than the twentieth working day following the date of receipt.

3. **Section 17** provides that:

- (1) 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.

(2) Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

**4. Section 30(1)** provides that –

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
  - (i) whether a person should be charged with an offence, or
  - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

**Section 30(2)** provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
  - (i) investigations falling within subsection (1)(a) or (b),
  - (ii) criminal proceedings which the authority has power to conduct,
  - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
  - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.”

**5. Section 40** provides that –

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."