

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 July 2009

Public Authority: Her Majesty's Revenue and Customs
Address: 1 Parliament Street
London
SW1A 2BQ

Summary

The complainant requested information from Her Majesty's Revenue and Customs (HMRC) about investigations concerning a particular company. HMRC refused to confirm or deny if the requested information was held by virtue of section 44 of the Act 'prohibitions on disclosure'. The Commissioner has investigated and found that the requested information, if held, would be exempt by virtue of section 44(1)(a) of the Act. Furthermore, HMRC was correct to rely on section 44(2) to neither confirm nor deny if the requested information is held.

The Commissioner's Role

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

2. The complainant made a request to HMRC on 6 March 2008 to see the file on its investigations into a particular company.
3. HMRC responded on 15 July 2008 stating that it would neither confirm nor deny if it held the information requested by virtue of section 44(2) of the Act. An appendix to the HMRC letter explained its reasoning, namely that section 44(1)(a) of the Act exempts information from disclosure if its disclosure is prohibited by any other enactment or rule of law. HMRC explained that section 18(1) of the

Commissioners for Revenue and Customs Act 2005 (CRCA) provides that HMRC may not disclose information which is held by it in connection with a function of HMRC. Section 23(1) further provides that information relating to a person, the disclosure of which is prohibited by section 18(1) is exempt for the purposes of section 44(1)(a) of the Act if its disclosure would specify the identity of the person to whom the information relates. "Person" in this regard includes both natural and legal persons such as companies. The company and other persons would be so identified and therefore the exemption applied. HMRC further explained that section 44(2) provides that the duty to confirm or deny that the information is held does not apply if the confirmation or denial itself would fall within any of the provisions of section 44(1). HMRC stated that section 23 makes no mention of the section 18(2) and (3) conditions which set out circumstances where the section 18(1) duty is set aside.

4. However, HMRC explained that it may, on a discretionary basis and outside of the terms of the Act, disclose information where it receives the necessary consent of the customer because of the exception in section 18(2)(h) of the CRCA. However, it explained that it would only consider such a disclosure to
 - The company itself where the request is made by an appropriate officer, or
 - To a person who has provided HMRC with the company's and any other persons' whose information is requested specific authority permitting it to disclose the information to them.
5. The complainant asked for an internal review of HMRC's decision on 1 September 2008. HMRC replied on 24 September 2008 and confirmed that following review the original decision was maintained. HMRC's letter reconfirmed its view that in considering the interaction of section 23 and section 18(1) of the CRCA and section 44 of the Act there is no need to read in the discretionary disclosure provisions in section 18(2) of the CRCA to modify section 18(1) of the CRCA.

The Investigation

Scope of the case

6. The complainant wrote to the Commissioner on 22 July 2008 to complain about the handling of his request by HMRC. The Commissioner wrote back on 1 September 2008 to explain that before pursuing a complaint with the Commissioner, he would need to request an internal review of the original decision by HMRC. As noted, the complainant received the result of the internal review in a letter dated 1 September and he lodged his complaint with the Commissioner on 3 October 2008.

Chronology

7. The Commissioner wrote to the complainant on 7 October 2008 to confirm receipt of the complaint and again on 7 April 2009 following a review of the case papers to see whether he was willing to take up HMRC's offer to deal with his request on a discretionary basis outside the Act. This offer had been made in HMRC's original

refusal letter dated 15 July 2008 and was repeated in HMRC's internal review letter. On 18 August 2008 HMRC had received a letter signed by a director of the company giving his consent to HMRC to disclose information about the company to the complainant. However, HMRC stated that it needed also to see evidence of his current status as a director of the company (e.g. a copy of the current register of Directors on file at Companies House). In response to the Commissioner's enquiry, the complainant rang to explain on 8 April 2009 that it would not be possible to provide the required documentary evidence as the company no longer existed.

Analysis

Exemption

8. Section 44(1)(a) provides that information is exempt information if its disclosure is prohibited by or under any enactment. Section 44(2) provides that the duty to confirm or deny does not arise if the confirmation or denial that would have to be given in order to comply with section 1(1)(a) would fall within the 44(1)(a). The prohibition relied upon by HMRC is that contained within the CRCA.
9. Section 18(1) of the CRCA provides that HMRC official may not disclose information which is held by HMRC in connection with one of its functions. Section 23(1) of the CRCA further provides that information relating to a (natural or legal) person, the disclosure of which is prohibited by 18(1), is exempt information for the purposes of section 44(1)(a) of the Act if its disclosure would specify the identity of the person to whom the information relates, or would enable the identity of the person to be deduced.
10. HMRC has acknowledged that section 18(2) sets aside the duty of confidentiality in some circumstances, including where HMRC has consent of the 'person' to which, or to whom, the information in question relates. HMRC's view is that section 18(2) does not affect the interaction of section 18(1) and 23 of the CRCA so as to negate the application of section 44 of the Act. Rather, it stands outside of the Act and its effect is that HMRC may, on a discretionary basis, disclose information it holds.
11. The Commissioner understands that HMRC's reasoning for this position is that section 23 of the CRCA makes no mention of section 18(2) and 18(3) and the conditions which are noted. In HMRC's view, if Parliament had intended for section 23 of the CRCA to take account of section 18(2) and 18(3) exceptions it would have said so.
12. HMRC argues that the information sought, if held would be held in connection with its Revenue and Customs function to assess and collect betting duty and thus meets section 18(1) of the CRCA and relates to identifiable persons and thus meets section 23.
13. The Commissioner is satisfied that the information, if held, would meet the requirements of section 18(1) and 23 as it would clearly be held for the purpose of one of HMRC's functions, namely assessing and collecting betting duty, and would relate to identifiable persons, both natural and legal.

14. However, the Commissioner disagrees with HMRC's position that section 18(2) of the CRCA does not affect the interaction of section 18(1) and 23 of the CRCA. Rather the Commissioner believes that it is not possible to determine whether or not section 18(1) is engaged without reference to section 18(2). In the Commissioner's opinion in order to correctly apply this particular statutory bar the following must be considered:

- first whether the requested information would, if held, be held in connection with a function of HMRC and thus meet the requirements of section 18(1);
- second whether any of the exceptions in section 18(2) apply; and
- third whether the information relates to an identifiable person or persons and thus the requirements of section 23(1) are met.

15. In the recent Information Tribunal decision *Mr Andrew John Allison v Information Commissioner and HMRC (EA/2007/0089)* the Tribunal agreed with the Commissioner's interpretation of the statutory bar:

"The Tribunal feels that on balance the arguments of the Commissioner are to be preferred. First the Tribunal finds it difficult to find any ambiguity on the face of section 18(1) and section 18(2) of the 2005 Act such as to import the necessity to have recourse to Hansard under the well known principles considered in *Pepper v Hart*. The language of the relevant provision in the 2005 Act is clear. It is simply not possible to determine whether or not section 18(1) is engaged without reference to section 18(2). Moreover, on a clear reading of the statute, in the Tribunal's view, it is only if the information is such that none of the exceptions in section 18(2) apply that it can be said that section 18(1) is fully engaged and that the information may not be disclosed. Next and perhaps crucially, section 18(1) whether or not coupled with section 18(2) does not represent a complete code whereby the question as to whether disclosure should be made can be answered. As the additional party (HMRC) itself accepts, whether information prohibited from disclosure by section 18(1) is in fact exempt depends on section 23. As a matter of statutory construction, therefore the Tribunal finds that in the absence of clear words which would expressly distance the operation of section 18(2) from section 18(1) such as to make section 18(1) a complete code in the way suggested, it is necessary to consider whether any of the exceptions in section 18(2) apply before an answer can be given to the question of whether disclosure is prohibited under section 18(1)."

16. Therefore, the Commissioner believes that he has to consider whether any of the exceptions contained within section 18(2) of the CRCA apply before he can conclude that the information, if held, would be exempt on the basis of section 44(2). In the circumstances of this case the relevant exception is that contained at section 18(2)(h) which refers to a disclosure "which is made with the consent of each person to whom the information relates".

17. HMRC explained to the complainant in its refusal letter of 15th July 2008 that where information requested related to a company it would be necessary to have the consent of an appropriate officer of the company in order to make disclosure

directly to the company. In the case of disclosure to a third party, that person would need to provide HMRC with specific consent not only from the company but also from any other persons whose information was included in the request to permit disclosure of the information HMRC held on the company and other persons to the requester. HMRC noted in its letter of 15th July 2008 that no proof of consent had been provided.

18. Therefore, the Commissioner is satisfied that no consent was given, in terms of the consent required for the exception contained at section 18(2)(h) of the CRCA to apply. Therefore the Commissioner is of the opinion that the exception contained at section 18(2)(h) cannot apply in this case.
19. On the basis of the above the Commissioner is satisfied that as a result of the interaction of section 18(1) and 23 of the CRCA the requested information, if held would be exempt by virtue of section 44(1)(a). The Commissioner also accepts that HMRC was entitled to refuse to confirm or deny whether or not it holds any information falling within the scope of the request, this is because section 44(2) of the Act provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would fall within any of paragraphs (a) to (c) of subsection (1). In this case confirming or denying if the requested information is held would specify the identity of the persons to whom the information relates and would reveal to the public something about the company's affairs. Consequently simply providing confirmation or denial that information is held would fall within sections 18(1) and 23(1) of the CRCA and thus by virtue of sections 44(1)(a) and 44(2) of the Act the duty to confirm or deny contained at section 1(1)(a) of the Act does not apply.

The Decision

20. The Commissioner's decision is that the public authority was correct to neither confirm nor deny if the requested information was held by virtue of section 44(2) of the Act.
21. However, the Commissioner's further decision is that the public authority did not deal with the request in accordance with section 17(1) in that it did not issue its refusal notice within the statutory time limit provided at section 10(1) of the Act.

Steps Required

22. The Commissioner requires no steps to be taken.

Right of Appeal

23. 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.
Website: 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 13th day of July 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

**Information Commissioner's Office
Wycliffe House
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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 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Prohibitions on disclosure

Section 44(1) provides that –

“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 a contempt of court.”

Section 44(2) provides that –

“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).”

Commissioners for Revenue and Customs Act 2005**18 Confidentiality**

- (1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.
- (2) But subsection (1) does not apply to a disclosure—
 - (a) which—
 - (i) is made for the purposes of a function of the Revenue and Customs, and
 - (ii) does not contravene any restriction imposed by the Commissioners,
 - (b) which is made in accordance with section 20 or 21,
 - (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
 - (d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
 - (e) which is made in pursuance of an order of a court,
 - (f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,
 - (g) which is made to the Independent Police Complaints Commission, or a person acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, or
 - (h) which is made with the consent of each person to whom the information relates.
- (3) Subsection (1) is subject to any other enactment permitting disclosure.
- (4) In this section—
 - (a) a reference to Revenue and Customs officials is a reference to any person who is or was—
 - (i) a Commissioner,
 - (ii) an officer of Revenue and Customs,
 - (iii) a person acting on behalf of the Commissioners or an officer of Revenue and Customs, or
 - (iv) a member of a committee established by the Commissioners,
 - (b) a reference to the Revenue and Customs has the same meaning as in section 17,
 - (c) a reference to a function of the Revenue and Customs is a reference to a function of—
 - (i) the Commissioners, or
 - (ii) an officer of Revenue and Customs,
 - (d) a reference to the Scottish inspectors or the Northern Ireland inspectors has the same meaning as in section 27, and

- (e) a reference to an enactment does not include—
 - (i) an Act of the Scottish Parliament or an instrument made under such an Act, or
 - (ii) an Act of the Northern Ireland Assembly or an instrument made under such an Act.

23 Freedom of information

- (1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act [2000 \(c. 36\)](#) (prohibitions on disclosure) if its disclosure—
 - (a) would specify the identity of the person to whom the information relates, or
 - (b) would enable the identity of such a person to be deduced.
- (2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.
- (3) In subsection (1) “revenue and customs information relating to a person” has the same meaning as in section 19.