

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 March 2010

Public Authority: The Valuation Office Agency
(An executive Agency of Her Majesty's Revenue and
Customs)

Address: 4th Floor
100 Parliament Street
London
SW1A 2BQ

Summary

In 2008, the complainant corresponded with the Rent Service over a period of six months requesting detail regarding the methods by which rental information was gathered in the local area. Having received some answers, the complainant requested a review of the Rent Service's failure to disclose information about the letting agents used to create rental lists for the setting of rents. She also wanted to know which letting agent had quoted a particularly low rent for two bungalows. The Rent Service refused to disclose the requested information and cited section 40(2) (personal information), section 41 (information provided in confidence), section 43(2) (commercial interests) and section 36 (prejudice to the conduct of public affairs). A complaint was made to the Information Commissioner's Office and, following an internal review, the Rent Service was asked to provide the information to the Commissioner. On 1 April 2009, the Rent Service was absorbed into the Valuation Office Agency (the 'VOA') which is an executive agency of HM Revenue and Customs. On 30 April 2009 the VOA responded to the Commissioner and informed him that it was now also citing section 44 as a new exemption. The VOA argued that section 18 of The Commissioner's for Revenue and Customs Act 2005 gave it an absolute exemption from disclosure. The Commissioner finds that the section 44 exemption cannot be applied retrospectively in this case but that because the statutory prohibition does now apply to the information it would not be appropriate for him to consider any steps to order disclosure of the withheld information. Therefore the decision notice does not consider any of the exemptions originally claimed.

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.

Background

2. The Rent Service / Valuation Office Agency employ Rent Officers who collect rental information for different rental market areas and then use this data to set the Local Housing Allowance (the 'LHA'). This is used to make decisions about Housing Benefit.
3. The Rent Officer will therefore compile a list of rents in ascending order of value of existing assured tenancies for each category of property in the local area. These rents are no more than twelve months old. The Rental Officer must then ensure that sufficient data is collected that accurately reflects the market.
4. This data is then provided on a monthly basis to all local authorities with a Housing Benefit function. It is used to calculate an LHA for that month.
5. The complainant's correspondence suggests that she does not consider the rental list for her local area to be accurate.
6. Between April and August 2008, the complainant made multiple information requests to the Rent Service regarding the methods by which rental information was gathered. During this correspondence, the complainant posed a number of questions to the Rent Service which they attempted to answer.

The Request

7. On 9 July 2008, as part of the ongoing dialogue, the complainant asked for the name of the letting agents that let two properties in Dawlish for £39.50 per week together with details of other agents.
8. On 6 August 2008, the Rent Service responded to this request. They refused to disclose the requested information and cited section 40(2)

(personal information), section 41 (information provided in confidence) and section 43 (commercial interests).

9. The complainant wrote to the Commissioner on 13 August 2008. The investigation which followed focused on the need for an internal review.
10. On 12 November 2008 following the intervention of the Commissioner, the complainant formally requested that the Rent Service should undertake an internal review of their decision to refuse the following information:
 - *'The full and comprehensive list naming the letting agents used*
 - *Full details of the letting agent who dealt with the two bungalows in Dawlish which were rented out at £39.50 a week in January 2008.'*
11. In their internal review, which was carried out on 12 December 2008, the Rent Service refused to disclose the requested information and cited section 40(2) (personal information), section 41 (information provided in confidence) and section 43(2) (commercial interests). They then added section 36 (prejudice to the effective conduct of public affairs).

The Investigation

Scope of the case

12. On 14 December 2008 the complainant informed the Commissioner that she did not accept the conclusion of the internal review and wished him to consider the matter.

Scope of the Decision

13. During the Commissioner's investigation, on 1 April 2009, the Rent Service was absorbed into the VOA which is an executive agency of HM Revenue and Customs ('HMRC'). This change in circumstance led the VOA to cite section 18 of The Commissioner's for Revenue and Customs Act 2005 (the 'CRCA') as an absolute exemption from disclosure by virtue of section 44(1)(a) of the Act.
14. It is a well established principle that the Commissioner will follow the guidance laid down by the Tribunal in the case of *the Department for Business, Enterprise and Regulatory Reform and the Friends of the Earth (EA/2007/0072)*. The Tribunal endorsed the approach that the

application of exemptions and the public interest test must be considered at the time of the request. Therefore the exemption cannot be applied retrospectively in this case as CRCA did not apply it at the time the request was made.

15. However, the Commissioner is aware that if section 18 of the CRCA now applies to this case, it would be inappropriate to order disclosure if this would contravene a statutory prohibition. If considerations under the original exemptions favoured disclosure the Commissioner has the ability to take into account these new circumstances when considering the steps to make the public authority comply with section 1(1) of the Act. In very limited circumstance such as these the Commissioner will use his discretion not to enforce compliance with the Act. Therefore, should the Commissioner find that section 18 of the CRCA applies at the time of his decision he would support the refusal of HMRC to disclose the information.
16. Comments by Burton J in the High Court case of *Office of Government Commerce and the Information Commissioner and Her Majesty's Attorney General [2008] EWHC 737 (Admin)* support this approach. At the hearing the issue was raised as to whether circumstances post-dating the original requests for information under the Act could be taken into account. Burton J commented that the "*decision as to the steps required to be taken by the authority may take account of subsequent changes of circumstances*" (paragraph 98).

Chronology

17. On 30 March 2009 the Commissioner wrote to the Rent Service and asked that they should send the Information Commissioner's Office (the 'ICO') a copy of the requested information. The Commissioner requested confirmation that the Rent Service remained reliant on the exemptions quoted at internal review. He also asked a number of questions relating to the relationship between the Rent Service and the letting agents and asked for an example document of the confidentiality agreement with the letting agents. He asked for further evidence that disclosure of the information would prejudice the commercial interests of the letting agents and would adversely affect the Rent Service's ability to effectively conduct public affairs.
18. On 23 April 2009 the Commissioner was informed that the Rent Service had ceased to exist on 1 April 2009. Its functions had been transferred to the Valuation Office Agency (the 'VOA').
19. The Commissioner notes that as the VOA is not a public authority itself but an executive agency of HMRC, under the Act the public authority in

this case is actually the HMRC and not the VOA. However, for the sake of clarity, this decision notice refers to the VOA as if it were the public authority.

20. On 30 April 2009 the Commissioner received a substantive response to his letter of 30 March 2009. The VOA remained reliant upon the exemptions set out in sections 36, 40, 41 and 43 of the Act. They explained the nature of the relationship between the Rent Service / the VOA and the letting agents and provided an example letter confirming confidentiality with the letting agents. The VOA then provided further reasoning to support the exemptions cited.
21. In this letter, the VOA explained that the management of Rent Officers and their operational staff transferred to the VOA on 1 April 2009. As this was an executive agency of HMRC each Rent Officer and former Rent Service employee therefore became an officer of HMRC. The VOA therefore cited section 44 as a new exemption. The VOA argued that section 18 of The Commissioner's for Revenue and Customs Act 2005 gave it an absolute exemption from disclosure.

Analysis

Does the CRCA statutory prohibition apply to the requested information?

22. Section 18(1) of The Commissioner's for Revenue and Customs Act 2005 states

"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"

23. Section 18 of the CRCA did not apply at the time of the initial request when it was submitted to the Rent Service on 9 July 2008. It has been subsequently cited due to the change in circumstances with the absorption of the Rent Service into the VOA (an executive agency of HMRC) on 1 April 2009.
24. The Commissioner agrees that the officials of the VOA are now employees of HMRC and are therefore subject to section 18 of the CRCA. The Commissioner judges that it must be considered now, as that the functions of the Rent Service have been absorbed into the HMRC via the VOA. Breach of the CRCA is a criminal offence and the Commissioner cannot require officers of HMRC to disclose information if to do so would itself contravene the statutory prohibition.

25. The full text of section 18 CRCA is set in the legal annex at the end of the notice. This Commissioner finds that none of the exceptions under 18(2) and (3) are satisfied. Having considered section 18(4) the Commissioner is satisfied that the information is now held by the Revenue and Customs in connection with a function of Revenue and Customs. The Commissioner finds that if he were to order disclosure of the withheld information this would contravene section 18 CRCA.
26. Following the position set out in paragraphs 13-16 above: as the statutory prohibition now applies to the information the Commissioner would not seek to enforce compliance with any breaches of section 1(1)(a) of the Act. In light of this the Commissioner finds that it would be academic and disproportionate to consider the exemptions at the time the request was received as he would be unable to discount the altered circumstances in any steps he would order.

Procedural breaches

Section 17

27. The full text of section 17 is available in the Legal Annex at the end of this Notice.
28. Section 17(1)(b) states that should a public authority claim that the information requested is exempt, it should specify the exemption in question. In the initial refusal notice of 6 August 2008, in citing section 41 (information provided in confidence), the Rent Service should have detailed section 41(1)(b) and in citing section 43 (commercial interests), they should have cited section 43(2). In the internal review of 12 December 2008, the Rent Service correctly cited section 40(2) and section 43(2); however they should have cited section 41(1)(b) and section 36(2)(c) instead of simply section 36 and section 41.

The Decision

29. The Commissioner's decision is that in failing to specify the full exemptions, The Rent Service was in breach of section 17(1)(b) of the Act.
30. The Commissioner has not considered whether the exemptions cited by the Rent Service at the time of the request for information were in accordance with the Act. This decision has been made based on the new legal restrictions placed upon the Rent Service when it became absorbed into the VOA and therefore part of HMRC.

31. The Commissioner's decision is that the VOA could not be required to disclose the withheld information by virtue of section 18 of CRCA.

Steps Required

32. The Commissioner requires no steps to be taken.

Right of Appeal

33. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 23rd day of March 2010

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

Section 17

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 44

(1) 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.

(2) The duty to confirm or deny does not arise if the confirmation of 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

Section 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.

Section 23

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.

Borders, Citizenship and Immigration Act 2009

Section 19

(4) In section 23 of the Commissioners for Revenue and Customs Act 2005 (c. 11)

(freedom of information), after subsection (1) insert—

"(1A) Subsections (2) and (3) of section 18 are to be disregarded in determining for the purposes of subsection (1) of this section whether the disclosure of revenue and customs information relating to a person is prohibited by subsection (1) of that section."