

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 21 September 2010**

**Public Authority:** Her Majesty's Revenue and Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

### Summary

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The complainant made a request to Her Majesty's Revenue and Customs ("the public authority") for information about VAT liability of UK-based businesses which undertake betting exchange transactions for third parties. The public authority claimed that some information was held but was exempt by virtue of sections 35(1)(a) and 42(1). It also refused to confirm or deny whether further information was held by virtue of section 44(1)(a). This was later varied to sections 21, 31(1)(d) and 42(1) in respect of information the public authority confirmed it held, and 44(2) in respect of whether any further information is held. Reliance on sections 21 and 42 were not challenged by the complainant.

The Commissioner's decision is that the exemption at section 31(1)(d) is engaged but that the public interest in maintaining the exemption does not outweigh that in disclosure. He also finds that the public authority was incorrect to neither confirm nor deny that it holds any further information by virtue of section 44(2). The public authority's handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

### 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.

## Background

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2. The requester in this case is acting on behalf of a company which is querying the public authority's imposition of tax duties. The requester accepts that this company is not a 'betting exchange', but believes that some of its activities are similar to those of other betting exchange operators in the UK. He therefore believes that the company should receive similar tax treatment as betting exchange operators for VAT purposes. The company has lodged an Appeal with the VAT & Duties Tribunal and is seeking further information before deciding whether or not to seek a Judicial Review.
3. The public authority provided the complainant with the following information about betting exchanges:

***"extract from V1-7, Chapter 19:  
2.1 Betting Exchanges***

*Betting Exchanges are a relatively new internet - based phenomenon. They facilitate betting between private individuals and also enable bookmakers to deepen their markets and hedge risk. Users of betting exchanges are usually categorised as either 'layers' ie those customers who offer a price/odds on an event happening, or 'backers' ie customers who bet on an event happening at a given price/odds.*

*For example:*

- *A layer selects an event, say, a football match between Rotherham United and Sheffield United, and judges the odds of a Rotherham United win at 3-1. The maximum stake they are prepared to accept at those odds might be £50. If the bet is fully matched then in this example the maximum liability of the layer will be £150 and the maximum win if Rotherham United lose or draw would be £50.*
- *Exchanges will usually show the 3 best prices for a given event. Using the same event described above, it might be that the best layer price is 4-1 for a Rotherham United win, but with a maximum stake of £10. The next best prices are 3-1, with a maximum stake of £50 and 2-1 with a £100 maximum stake. If a backer wanted to stake £30 on Rotherham United at the best possible price, s/he would place £10 at 4-1 and the remaining £20 available at the next best price of 3-1. The backer could lose his/her stake of £30 and has the chance of winning £100.*

- *The source of revenue for most exchanges is a commission charged on customer winnings. The charge usually varies between 2-5%, with lower fees for larger and more frequent customers. For VAT purposes we currently regard this commission as consideration for an exempt supply of the provisions of facilities for the placing of bets under VATA 1994, Schedule 9, Group 4, Item 1".*
4. The public authority has also published the following guidance within its Notice number 701/26<sup>1</sup>, which exempts betting and lottery agents from paying VAT:

*"If you are a pools agent, concessionaire or collector, your services exempt [sic] from VAT, and you are not therefore required to account for VAT on the commission that you receive. The services of bookmakers who act as agents for other bookmakers, or for the Tote in accepting bets and the services of bookmakers' agents, are also exempt. If these are your only sources of self-employed income you cannot register for VAT".*

5. The following newspaper article also provides some background information about the history of betting exchanges:  
<http://www.guardian.co.uk/sport/2009/mar/29/betfair-horse-racing>

## The request

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6. On 26 March 2009 the complainant made the following information request:

*"I wish to be provided with any information held by HMRC which specifically relates to the Department's policy regarding the VAT liability of income received by UK based businesses involved in betting exchange transactions undertaken for third parties. Examples of the type of organisations of this nature operating in the UK are Betfair, Betdaq and WBX.*

*The information you provide in response to this request should specifically include the following items set out in a) to c) below*

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[http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageVAT\\_ShowContent&id=HMCE\\_CL\\_000278&propertyType=document#downloadopt](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000278&propertyType=document#downloadopt)

*but should not be restricted to these items where there are other documents of relevance to our request:*

*a) Internal memoranda or draft notices within HMRC relating to the treatment of commissions collected by betting exchange organisations where the organisation provides the facility for the placement of bets between two parties but does not bear the risk of the bet and merely acts as an agent, collecting a commission of a specified percentage of the monies bet or winnings achieved or any other fixed fee based charge based on the value or number of bets placed.*

*b) Correspondence entered into by HMRC with specific organisations (suitably edited to protect the identity of the businesses involved) or any related internal correspondence within HMRC or with other Government Departments, regarding the VAT liability of income falling into the category of supplies detailed in a) above received by such organisations.*

*c) Details of the basis of any agreements or concessions entered into by HMRC and any rulings given to betting exchange or similar organisations in b) above relating to betting exchange transactions concerning their liability to VAT, including any internal decisions and the basis for such decisions determined by HMRC Policy division."*

7. On 30 April 2009 the public authority responded. It made no comment regarding the opening part of the complainant's request. It advised that part (a) of the request was exempt under section 35(1)(a) (formulation or development of government policy). It also advised that some of this part of the request was further exempt by virtue of section 42(1) (legal professional privilege). In respect of parts (b) and (c) of the request, it refused to confirm or deny whether any information was held. It did so citing section 44(2) (prohibitions on disclosure) by virtue of section 44(1)(a), stating that the prohibition was in line with section 18(1) of the Commissioners for Revenue and Customs Act 2005 ("the CRCA").
8. The complainant asked for an internal review on 25 June 2009. In its response, sent on 30 July 2009, the public authority advised that it had identified two documents which fell within the scope of both the opening part of the request and part (a). It went on to advise that these two documents were exempt by virtue of sections 21 (information accessible to applicant by other means), 31 (law enforcement) and 42(1) (legal professional privilege), removing its earlier reliance on section 35(1); information covered by section 21

was provided to the complainant. It maintained its position in respect of parts (b) and (c) of the request.

## **The investigation**

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### **Scope of the case**

9. On 12 August 2009 the complainant wrote to the Commissioner to complain about the non-disclosure of information. He did not challenge the information which was exempted under section 21 as this had been supplied to him.
10. During the course of the investigation the Commissioner advised the complainant that only a small amount of information was being withheld under section 42(1). The complainant accepted that this was properly exempt and section 42(1) is therefore not further considered in this Notice.

### **Chronology**

11. On 12 January 2010 the Commissioner discussed the case with the complainant. On 13 January 2010 he commenced his enquiries with the public authority.
12. The public authority responded to the Commissioner's enquiries on 12 February 2010.
13. On 3 March 2010 the Commissioner contacted the complainant to provide an update. He asked him to consider withdrawing his complaint in respect of section 42(1). He also clarified that, in respect of parts (b) and (c) of the request, he was only considering whether or not the public authority was correct in neither confirming nor denying that it held any information, i.e. his investigation would not be considering whether or not any information that may be held in respect of these parts of the request should be disclosed.
14. On 9 March 2010 the complainant agreed to withdraw his complaint in respect of section 42(1). He confirmed that he understood the limitations of the investigation but that he wished the Commissioner to proceed to a Decision Notice.

## Findings of fact

15. The Commissioners for Revenue and Customs Act 2005 ("the CRCA") provides a statutory prohibition from disclosure under section 18. The full text of the CRCA is available online<sup>2</sup>; the most relevant extracts for the purpose of this investigation are as follows:

*"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."*

*"19 Wrongful disclosure*

- (1) A person commits an offence if he contravenes section 18(1) ... by disclosing revenue and customs information relating to a person whose identity—*  
*(a) is specified in the disclosure, or*  
*(b) can be deduced from it."*

*"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".*

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<sup>2</sup> [http://www.opsi.gov.uk/acts/acts2005/ukpga\\_20050011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/ukpga_20050011_en_1)

## Analysis

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### Exemptions

#### Section 31 - law enforcement

16. The public authority introduced reliance on this exemption at internal review stage when it advised the complainant that it had identified two documents which fell within the scope of both the opening part and part (a) of his request. It advised him that these documents related to its policy regarding the VAT liability of betting exchanges and that section 31 applied where disclosure would be likely to prejudice the collection of taxes, for example by: *"... divulging the tax authorities' strategies or tactics in litigation proceedings"*.

17. Section 31(1)(d) provides that:

*"Information ... is exempt information if its disclosure under this Act would, or would be likely to, prejudice...the assessment or collection of any tax or duty or of any imposition of a similar nature..."*.

18. Section 31 is a prejudice based exemption and therefore to engage the exemption the public authority must demonstrate that disclosure would, or would be likely to, prejudice the collection of any tax or duty.

#### ***Likelihood of prejudice***

19. The public authority has not explicitly stated whether it believes disclosure would, or would be likely to, prejudice the exercise of its functions. In light of this the Commissioner considers it appropriate to apply the lesser test, that is to say the exemption will be engaged where disclosure *would be likely* to prejudice the exercise of its functions. This is in line with the Information Tribunal case of *Ian Edward McIntyre v Information Commissioner and The Ministry of Defence* [EA/2007/0068]<sup>3</sup> where it stated at paragraph 45:

*"We consider that...in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."*

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<sup>3</sup> [http://www.informationtribunal.gov.uk/Documents/decisions/McIntyreDecision04\\_11\\_02\\_08.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/McIntyreDecision04_11_02_08.pdf)

20. 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]<sup>4</sup> 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] EWHC 2073 (Admin). 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".*

### **Evidence of prejudice**

21. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.

22. The public authority has advised the Commissioner that:

*"The information withheld under this exemption concerns internal discussions ... on HMC&E's assessment of VAT liability in this area. The information continues to have relevance to the assessment and collection of VAT by HMRC and therefore the exemption continues to be engaged".*

23. It also provided the following information:

*"Disclosure of the information in question would reveal the internal discussion of the merits and demerits of HMRC's position and this would or would be likely to prejudice the assessment and collection of VAT. As I have already explained, it is a function of HMRC to assess whether, in law, a trader is making a supply which is subject to VAT or exempt from it. Where HMRC considers that a trader's supply is not exempt and therefore VAT is payable, the trader has the right of appeal to a Tax Tribunal. HMRC makes its decision on the facts of each case.*

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<sup>4</sup> [http://www.informationtribunal.gov.uk/Documents/decisions/connorpress\\_v\\_infocommissioner.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/connorpress_v_infocommissioner.pdf)



*If the withheld information were disclosed, individuals could arrange their affairs or rehearse arguments so that they might appear to qualify for the VAT exemption and therefore avoid being assessed for VAT. Alternatively, where HMRC has assessed a trader as liable for VAT, they might make use of the information to attempt to undermine HMRC's position before the Tax Tribunal".*

24. Although restricted in what he is able to say because of the nature of the withheld information, having reviewed it, and considered the public authority's arguments, the Commissioner is satisfied that the disclosure of this information would be likely to harm its abilities to collect VAT. This is because the information is likely to be of use to relevant parties to try and avoid paying VAT, thereby resulting in a loss of revenue to the Exchequer. The Commissioner therefore finds the exemption engaged in relation to the information withheld by virtue of section 31(1)(d) and he has carried this lower level of likelihood through to the public interest test.

#### ***Public interest arguments in favour of maintaining the exemption***

25. In favour of maintaining the exemption, the public authority has argued that there is:

*"... a strong public interest in HMRC being able to enforce the law properly so that the tax burden is shared equally. Anything that puts at risk our compliance activities could undermine public confidence in the tax system, which could damage the general climate of honesty among the overwhelming [sic]".*

26. It has also made further reference to the ongoing litigation between itself and the complainant relating to the liability to VAT of betting exchange transactions, stating: *"... that is a private interest not a public interest, and so not a factor to take into account in considering this balance".*

#### ***Public interest arguments in favour of disclosing the requested information***

27. The public authority acknowledges that there is a public interest in:

*"ensuring that HMRC is accountable for its decisions and is as transparent as possible about the ways in which it reaches them and in the public being aware of and being able to challenge our decisions".*

28. However, it went on to suggest this interest was already met by saying:

*"HMRC is subject to review by various external bodies including, on an individual level the Appeal Commissioners, so the public interest in our accountability is met by their oversight".*

29. The complainant has also countered the public authority's arguments in favour of maintaining the exemption, stating:

*"I submit that disclosing this information can have no affect [sic] on the collection of tax and duty **correctly due**, and the reliance on this clause is quite inappropriate".*

30. He made further reference to the Judge's observation in *Banks v Secretary of State for the Environment, Food and Rural Affairs* [2004 EWHC 1031] which states:

*"Frank disclosure of the decision making process does not mean referring to so much of the truth as assists the public body's case. It means presenting the whole truth including so much of the truth as assists the applicant for judicial review."*

31. In response to the public authority's arguments against disclosure above the complainant has also stated that:

*"[its] belief that there could be more than one appellant who would wish to avail themselves of this information is a tacit acceptance that the release of this information is in the public interest, as any person wishing to act as an agent for the placing of bets is entitled to know what HMRC's policy is on what HMRC describes as a relatively new "internet-based phenomenon". If that is so, then section 31 does not apply as this is a qualified exemption and it must be subject to the public interest test".*

32. The complainant further disputed the public authority's reasoning stating:

*"[its] argument that there is scope for review by external bodies of HMRC decisions is an irrelevant aside, as no such test is provided by the FOI act on whether a matter is in the public interest".*

33. The complainant reinforced his position by reference to further case law which he believed supported the public interest in disclosure of the requested information. He included the following argument:

*"In the famous 1936 case (IRC v Duke of Westminster ([1936] 19 TC 490) with regard to the taxation affairs of the then Duke of Westminster Lord Tomlin said 'Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be'. In doing so he reinforced the 1929 ruling of Lord Clyde in the case Ayrshire Pullman Motor Services & Ritchie v CIR ((1929) 14 TC 754) in which he said 'No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow – and quite rightly - to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue'".*

34. The complainant concluded his arguments about the public authority's citing of this particular exemption by stating:

*"... I reject entirely the interpretation of Section 31(d) [sic] by HMRC. There is an absolute right of all taxpayers to be aware of HMRC policy in this, like any other, area".*

### ***Balance of the public interest arguments***

35. Whilst acknowledging the strong public interest in protecting the activities in section 31 of the Act, the Commissioner is mindful of the fact that the public interest factors in disclosure must be considered and given the appropriate weight in accordance with the circumstances of the case.
36. In this case, the Commissioner has given weight to the argument that:
- the assessment of any tax or duty should not be prejudiced; or,
  - the collection of any tax or duty should not be prejudiced.
37. The public authority's arguments in support of its position that the information is properly withheld under this exemption can be summarised as follows:
- the public authority should be able to enforce the law properly and collect the correct amount of tax in order to support public spending;
  - disclosure of the requested information may allow an individual to 'beat the system' and avoid paying the correct tax;

- an interested party may be able to make use of the withheld information to attempt to undermine the public authority's position before the Tax Tribunal;
  - the public interest in its accountability is already met as it is subject to review by various external bodies.
38. The Commissioner accepts that there is a strong public interest in the public authority being able to enforce the law properly and collect the correct amount of tax due to the Exchequer. Clearly, if disclosure of the withheld information resulted in less income being collected by HMRC, over time there would be less money available in the public purse. Moreover, tax evasion or fraudulent claims ultimately mean that a greater tax burden falls unfairly on compliant taxpayers.
39. However, the Commissioner is also of the opinion that there is a strong public interest in taxpayers knowing whether or not they should be liable to pay tax in any given position. Amongst other things, this may encourage compliance and confidence in the tax system.
40. The Commissioner also believes that there is a general public interest in the release of information that will lead to a better understanding of the taxation system. The Commissioner further notes that there are only a small number of organisations which are classed as 'betting agents' so he believes that the public authority would be in a good position to investigate any potential flouting of tax liabilities brought about by the disclosure of the information. This will limit the extent to which the collection of taxation would be likely to be prejudiced.
41. The Commissioner understands the public authority's view that, were the information disclosed, certain individuals may be able to try to 'beat the system' and avoid paying the correct tax. However if information setting a clear boundary as to whether or not duty is necessary to be paid were readily available, then any affected party would know whether or not it was compliant with this duty. Although the public authority has argued that such knowledge may allow those parties concerned to avoid the payment of such a duty the Commissioner does not accept that this argument carries much weight more generally in respect of the withholding of this particular information. This is because it should be clear to all parties whether or not they are in fact liable.
42. Whilst the Commissioner understands the public authority's position that the complainant in this case has asked for the information to support his own particular circumstances, as he is disputing whether his company is liable to pay tax, the Commissioner notes that clear and unequivocal guidance and policy in this area is not already available. If

someone was considering setting up a new 'betting agency' it would seem reasonable that they would wish to know what their tax liabilities might be. The imposition, or not, of a tax duty may, for example, mean the difference between making a profit and failing to have a viable business. Without the full picture it would be difficult to know how best to proceed with a business plan. The Commissioner considers that there is a public interest in facilitating a transparent environment for new businesses.

43. The public authority has also argued that an interested party may be able to make use of the withheld information to attempt to undermine its position before the Tax Tribunal. However, again the Commissioner does not consider that this argument carries much weight for the following reasons.
44. Bearing in mind that the complainant in this case has advised that he has a forthcoming case with the Tax Tribunal, the Commissioner sought further information from the public authority about what information would be made available to a party at a Tax Tribunal and whether or not the public were able to attend. He was advised:

*"You have asked whether the requested information would be put into the public domain in the course of appeal proceedings. When civil proceedings are commenced, HMRC will make appropriate disclosures and exchange documents with the other parties for the purposes of those proceedings, as required by law. Putting all the requested information into the public domain under the FOIA would prejudice HMRC's legal position in such proceedings.*

*HMRC might draw on this information in the course of appeal proceedings, dependent on the particular facts of a case and the arguments presented by the appellant. HMRC would exercise judgment and discretion in deciding whether to cite this information in a particular case. The hearings of the Tax Tribunal are normally public and there is normally no restriction on the appellant regarding onward disclosure".*

45. The Commissioner therefore concludes that if any of the requested information has previously been used in an earlier appeal, then it will normally have been disclosed to the party/parties 'as required by law'. Furthermore, that appeal is likely to have been heard in public with no restriction regarding 'onward disclosure'. The complainant has been advised that the withheld documents in this case are:

- (1) a submission from a policy advisor to a policy branch head seeking guidance in light of an appeal which has been referred to the European Court of Justice; and,
- (2) the policy branch head's response.

The documents therefore postdate an appeal so they will only have been 'made public' if they have been relied on for further appeals, of which the Commissioner is unaware. However, he can conclude that any of the withheld information which is pertinent to the complainant's own particular appeal will be likely to be passed to him, without restriction, with the potential to be heard or placed into the public domain in the future if the complainant so wishes. Therefore, the fact that such appeals are 'public' and that there is no ongoing restriction regarding disclosure means that the Commissioner does not find that the public authority's arguments regarding the undermining of the Tax Tribunal in this respect carry much weight.

46. The Commissioner accepts that releasing the entire contents of an appeal into the public domain in advance of that appeal could obviously be seriously detrimental to that process. However, the information requested is not information which has been specifically collated for the complainant's forthcoming appeal. The complainant has asked for generic policy and guidance which must therefore encompass information that has been created either for a previous case, meaning it is likely to have already been made 'public', or is purely internal advice on which the public authority can make its determinations. Accordingly, the Commissioner does not consider that these arguments carry much weight.
47. Furthermore, the Commissioner does not agree that there is much weight in the public authority's argument that the public interest in its accountability is already met as it is subject to review by various external bodies. The general accountability of the public authority is not in dispute, rather the complainant has made a request for information under the Act in order to understand VAT liability in a particular business area.
48. The public authority itself has noted the public interest in ensuring that it is accountable for its decisions and is as transparent as possible about the ways in which it reaches them. It has also noted the public interest in making people aware of and therefore able to challenge its decisions. The Commissioner considers that these are compelling arguments to support disclosure of the requested information, particularly in light of his review of the withheld information itself and the lack of a clear understanding regarding this particular matter of taxation. Additionally, although he accepts that a party is able to

challenge the public authority's decisions on tax matters, the Commissioner believes that there is a strong public interest in general policy and advice in this area being made available without the necessity to go to such lengths.

49. Having considered the arguments above, the Commissioner finds that there are strong arguments both for and against maintaining the exemption. However, whilst the Commissioner accepts that the public authority's ability to collect tax would, to an extent, be likely to be prejudiced by disclosure of the withheld information he is of the view that, on balance, the factors in support of disclosing the information carry more weight. He therefore concludes that the public interest which would be served by the disclosure of the information outweighs that in maintaining the exemption. The Commissioner therefore finds that the information was inappropriately withheld under section 31(1)(d).

#### **Section 44 – statutory prohibition on disclosure**

50. This exemption has been applied to parts (b) and (c) of the request. The public authority has neither confirmed nor denied that it holds any information under section 44(2) by virtue of 44(1)(a). It has cited the statutory prohibition in section 23(1) of the CRCA as its statutory basis. (The relevant parts of the CRCA are shown at paragraph 15 above).

51. 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...”.*

52. 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)”.*

53. This exemption at 44(2) is not qualified, meaning that if confirmation or denial that information is held is prohibited by or under any other enactment then there is no requirement to undertake a public interest test.

54. Section 23(1) of the CRCA provides that information relating to a 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 to be deduced.

55. In its refusal notice the public authority advised the complainant:

*"I note that, under b), you have suggested that it would be possible to edit any information, if held, in order to protect the identity of any businesses concerned. However, I consider that, if information were held and it were edited, it would still be possible to deduce the identity of such businesses because this trade sector is quite a narrow one with a small number of major businesses involved".*

*"The information you are seeking, if held, would be held in connection with our function to assess the VAT liability of identifiable taxpayers. Section 23(1) of the CRCA further provides that information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information for the purposes of section 44(1)(a) of the FOIA if its disclosure would specify the identity of the person to whom the information relates or would enable the identity to be deduced. Person includes both natural and legal persons such as companies (see para 110 of the explanatory notes to the CRCA<sup>5</sup>). In your request, you have focussed on UK based businesses involved in betting exchange transactions undertaken for third parties and you have given named examples of such businesses. The identity of such businesses could be deduced and so the exemption applies".*

*"If we told you whether or not we held the information we would be telling you something about the affairs of the companies within this sector. This would fall within section 44(1)(a) and hence section 44(2) exempts HMRC from the duty to confirm or deny".*

56. As section 23(1) of the CRCA works by reference to section 18(1) of the CRCA, it is necessary to consider how the prohibition in that section works. Section 18(1) of the CRCA provides that the public authority's officials may not disclose information which is held in connection with one of its functions. The public authority has explained, as shown above, that if it were to confirm whether or not it holds the requested information it would be breaching section 18(1) of the CRCA. The Commissioner accepts that the requested information is information

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<sup>5</sup>[http://www.opsi.gov.uk/acts/acts2005/en/ukpgaen\\_20050011\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/en/ukpgaen_20050011_en_1)



that, if it were held, would be for the purpose of assessing and collecting tax or duty.

57. The Commissioner is of the view that it is important to focus on the wording of the parts of the request to which this exemption has been applied. The information sought can be broadly placed into the following four categories:
- Correspondence entered into by the public authority with specific organisations.
  - Related internal correspondence within the public authority or with other Government Departments.
  - Details of the basis of any related agreements or concessions entered into by the public authority.
  - Any rulings given relating to betting exchange transactions concerning their liability to VAT, including any internal decisions and the basis for such decisions determined by the public authority's Policy division.
58. The public authority has cited section 44(2) of the Act as it believes that by confirming or denying it holds any of the above information it would breach the CRCA. However, the Commissioner does not accept this position for the following reasons:
59. In the Commissioner's view, confirming information is held in any of the above bullet points would not identify any specific party. He is further of the opinion that, if no information is actually held, then the prohibition on disclosure under the CRCA fails to be relevant. Although there are, by its own admission, very few organisations which are covered by this type of business profile, there are still a sufficient number whereby no assumptions can be drawn as to whom any information held relates. Furthermore, information may also be generic and therefore not specifically related to any one party at all. The Commissioner therefore does not agree that it is possible to draw a conclusion as to the identity of a party purely from the knowledge that the information at issue does or does not exist.
60. Whilst the Commissioner might agree that disclosure of any actual information that may exist could be prohibited under the CRCA (certainly where identity could be deduced), he does not agree that to either confirm or deny holding such information in this case would be in breach of the CRCA.
61. Accordingly, the Commissioner does not accept that section 44(2) is engaged.

## Procedural Requirements

### Section 1 – general right of access to information Section 10 - time for compliance

#### *Opening paragraph and part (a) of the request*

62. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and, in any event, not later than 20 working days after the request has been received.
63. For the reasons set out above the Commissioner is of the view that the information withheld under section 31(1)(d) ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act. By failing to supply this information within 20 working days the Commissioner finds that the public authority also failed to comply with section 10(1) of the Act.

#### *Parts (b) and (c) of the request*

64. In refusing to confirm or deny whether information was held on the basis of an exemption which the Commissioner concludes is not engaged, the public authority failed to comply with section 1(1)(a).
65. In failing to provide confirmation or denial within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 10(1).

### Section 17 – refusal of request

66. Section 17(1) of the Act 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 be otherwise apparent) why the exemption applies."*

67. The Commissioner finds that the public authority breached section 17(1)(b), in that it failed at any time to advise the complainant which subsection of the exemption at section 31 it was relying on. It also breached section 17(1) by failing to issue its refusal notice within 20 working days.

## The Decision

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68. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the Act:
- It breached section 17(1) of the Act by failing to issue a refusal notice within 20 working days.
  - It breached section 17(1)(b) of the Act by failing to state the relevant subsection of the exemption at section 31.
  - In respect of the opening paragraph and part (a) of the request, it incorrectly withheld information under section 31(1)(d); by failing to disclose this information it breached sections 1(1)(b) and 10(1).
  - In respect of parts (b) and (c) of the request, it incorrectly cited section 44(2); by failing to confirm or deny holding this information it breached section 1(1)(a) and 10(1).

## Steps Required

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69. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.

*Opening paragraph and part (a) of the request*

- It should disclose the information withheld under section 31(1)(d).

*Parts (b) and (c) of the request*

- It should provide confirmation or denial as to whether information falling within the scope of the request is held.
- In relation to any information that is held it should either disclose this to the complainant, or provide him with a refusal notice which is valid for the purposes of section 17(1).

70. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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71. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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72. 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](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 sent.

**Dated the 21<sup>st</sup> day of September 2010**

**Signed .....**

**Alexander Ganotis  
Group Manager**

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

## **Legal Annex**

### **Section 1 – general right of access to information**

- (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.

### **Section 10 - time for compliance with request**

- (1) Subject to subsections (2) and (3), 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.

### **Section 17 - refusal of request**

- (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.