

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 October 2013

**Public Authority:** HM Revenue & Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

### Decision (including any steps ordered)

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1. The complainant has requested all documents prepared for the Tribunal Appeal of [redacted]. HMRC stated it could neither confirm nor deny if the information was held as to do so would reveal information about the business and section 44(2) of the FOIA therefore prohibited this.
2. The Commissioner's decision is that HMRC has correctly applied section 44(2) of the FOIA by virtue of section 18(1) of the Commissioners for Revenue and Customs Act 2005 to neither confirm nor deny if the information is held.

### Request and response

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3. On 10 February 2013, the complainant wrote to HM Revenue & Customs (HMRC) and requested information in the following terms:

*"[redacted] the Tax Advisor to [redacted] requests sight of all documents that were prepared for the Tribunal Appeal [redacted]"*

*The request includes:-*

*i) All file papers leading up to the decision notified on 18<sup>th</sup> August 2010 to withdraw the assessments on the disputed items.*

*ii) All the file papers on the many reviews of the appeals, including all correspondence with Policy Branch, Solicitor's Office, and HQ leading up to the final decision letter dated May 2011.*

*iii) All file papers, discussion documents and notes prepared for the Statement of Case.*

*iv) All documents prepared for the tribunal hearing, including the "tribunal caseworker's" notes, the legal advice provided, and the technical and policy specialists' advice under [redacted]*

*v) All notes and documents relating to the request for costs.*

*vi) All notes and documents relating to the "thorough investigation" by the Complaints Team."*

4. HMRC responded on 14 February 2013. HMRC neither confirmed nor denied if the information was held as it considered to do so would reveal information about the entity [redacted] and if the information were held it would be held for HMRC's function of assessing and collecting tax. HMRC therefore informed the complainant it considered the section 44(2) exemption to be applicable by virtue of the Commissioner's for Revenue and Customs Act 2005.
5. Following an internal review HMRC wrote to the complainant on 14 March 2013. It upheld its decision to neither confirm nor deny whether the requested information was held on the basis of section 44(2) of the FOIA.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 4 April 2013 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of his investigation to be to determine if HMRC were correct to neither confirm nor deny that information was held as to do so would in itself reveal information about the business entity.

## **Reasons for decision**

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8. Section 44 of the FOIA states that:

*"(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 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)."*

9. HMRC has explained that section 44(1)(a) exempts information from disclosure if its disclosure is prohibited by any other enactment or rule of law. Section 18(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA) provides that Revenue and Customs officials may not disclose information that is held by HMRC in connection with one of its functions. The information requested in this case, if held, would be held in connection with HMRC's function of assessing and collecting tax. Any papers it holds in relation to a tribunal appeal or the handling of a tax affair of a business entity would be held for the functions of assessing and managing tax collection.
10. HMRC also explained in its internal review response that it considered that the information would also relate to an identifiable person and thus section 44(1)(a) of the FOIA applied. The Commissioner is aware that 'person' in the context of the CRCA includes both living persons and legal entities and section 23(1) of the CRCA provides that where information falling within section 18(1) relates to a person who is identified or could be identified then section 44(1)(a) of the FOIA applies.
11. Section 44(2) of FOIA provides that the duty to confirm or deny whether information is held does not apply if the confirmation or denial itself would fall within the provisions of section 44(1). HMRC has argued that if it disclosed whether it held information falling within the scope of the request it would be revealing something about the affairs of the entity named in the request. This would fall within section 44(1)(a) and therefore section 44(2) exempts HMRC from the duty to confirm or deny.
12. HMRC has acknowledged that section 18(2) and 18(3) CRCA sets aside the duty of confidentiality established by section 18(1) in some circumstances. However it made reference to the following amendment to section 23 of the CRCA under the Borders, Citizenship and Immigration Act 2009:

[http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga\\_20090011\\_en.pdf](http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga_20090011_en.pdf)

*19 Application of statutory provisions*

*(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.”*

13. HMRC said that if a request for information is considered under the FOIA, the exceptions in section 18(2) and (3) are not taken into consideration. The absolute prohibition against disclosure contained in section 18(1) is the only relevant provision in this regard, if the requested information were held.
14. Upon consideration of the submissions provided by HMRC, the Commissioner considers that if the requested information were held it would relate to HMRC’s functions for assessing and collecting tax. The Commissioner also does not consider that, if the information were held, there would be any relevant gateways to disclosure. In reaching his conclusions the Commissioner has considered previous cases involving the use of the CRCA by HMRC that have been considered by the Information Tribunal<sup>1</sup> and clarified the circumstances in which the statutory bar could be applied for the purposes of section 44 of the FOIA.
15. Finally the Commissioner considers that even confirming or denying whether the requested information is held, would in itself disclose information relating to the business. The Commissioner therefore considers that section 44(2) FOIA was correctly applied in this case.

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<sup>1</sup> Allison v ICO EA/2007/0087 and PriceWaterhouseCoopers v IC EA/2009/0049

## Right of appeal

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16. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

17. 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.
18. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**