

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 September 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 requested information in relation to tax for benefit for accommodation provided by British Airways to cabin crew at Heathrow.
2. The Commissioner's decision is that the public authority was entitled to refuse to confirm or deny whether it held the requested information on the basis of the exemption at section 44(2) FOIA.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 22 February 2013, the complainant wrote to the public authority and requested information in the following terms:

*'Under the terms of that act [FOIA] I would like answers to the following questions:*

- *For how long and since when has HMRC been collecting tax, regardless of who has been paying it, on hotel accommodation that British Airways (B.A.) provides to cabin crew at Heathrow during what is termed a Back to Back?*
- *Why was the pay office at B.A. instructed to deduct tax for benefit in kind for this accommodation through an individual's pay roll commencing April 2011 when it had not been instructed to do so*

*before, and why is it that British Airways does not submit the form P11D which is normal practice, with regard to this expense?*

- *Was the arrangement whereby B.A. does not submit a form P11D the result of a request by B.A.?*
  - *Whilst it is understood that the instruction to the pay office came from HMRC, who or what in the first instance prompted the instruction?*
  - *Who paid the aforementioned tax prior to April 2011?'*
5. The public authority responded on 21 March 2013. It refused to comply with request on the basis of the exemption at section 44(2) FOIA, citing section 18(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA) as its basis for doing so.
6. The complainant requested an internal review on 15 April 2013. The public authority wrote back to the complainant on 4 June 2013 with the outcome of internal review. It upheld the original decision to rely on section 44(2).

### **Scope of the case**

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7. The complainant contacted the Commissioner on 7 June 2013 to complain about the way her request for information had been handled. She challenged the application of section 44(2) for the reasons mentioned in her letter of 15 April 2013 to the public authority. The complainant's arguments are addressed further below.
8. The scope of the investigation therefore was determine whether the public authority correctly engaged the exemption at section 44(2) to refuse to confirm or deny whether it held information within the scope of the request.

## Reasons for decision

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### Section 44(2)

9. Section 1(1)(a) FOIA requires a public authority to inform any person making a request whether it holds information of the description specified in the request.<sup>1</sup>
  10. Information is exempt from disclosure on the basis of section 44(1) FOIA if its disclosure –
    - 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.
  11. Section 44(2) states 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 fall within any of paragraphs (a) to (c) of section 44(1).
  12. Therefore, a public authority relying on section 44(2) considers that it is excluded from complying with the duty to confirm or deny whether it holds the information requested because to do otherwise is; prohibited by or under any enactment, or is incompatible with any Community obligation, or would constitute or be punishable as a contempt of court.
  13. Section 18(1) CRCA 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.'*
  14. Section 18(2)(a)(i) CRCA states:

*'But subsection (1) does not apply to a disclosure which is made for the purposes of a function of the Revenue and Customs....'*
  15. Section 23 partly states:

*'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.....'*
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<sup>1</sup> This is commonly referred to as 'the duty to confirm or deny'

### *Complainant's arguments*

16. Section 18(2)(a)(i) of the CRCA provides an exception to section 18(1) CRCA. Section 18(2)(a)(i) states that section 18(1) does not apply if the disclosure is made '*for the purposes of a function of the Revenue and Customs.*' This effectively permits the requested information to be disclosed under the terms of the FOIA.
17. The term '*person*' in section 23(1) CRCA does not include companies. British Airways is therefore not caught by the provisions of CRCA. Paragraph 110 of the explanatory notes to CRCA does not include a public limited company within the definition of *person*. British Airways is a public limited company.
18. In any event, the exemption at section 44(2) should not prevent the public authority from answering '*some of the questions posed...*'

### *Public authority's arguments*

19. The public authority may not disclose information held in connection with its functions by virtue of section 18(1) CRCA. The requested information, if held, would be held by the public authority for the purposes of assessing direct taxes – one of its functions. Therefore, confirming or denying whether it holds the requested information is prohibited by section 18(1) CRCA – i.e. an enactment.
20. A disclosure under the FOIA is not a disclosure for *a function* of the public authority envisaged by section 18(2)(a)(i) CRCA. The functions of the public authority are described in section 5 CRCA and they do not include disclosures under the FOIA.
21. Furthermore, an amendment to section 23 CRCA was introduced in 2009 to make it clear that the exceptions to the public authority's duty of confidentiality set out in sections 18 (2) and (3) CRCA are to be disregarded when considering disclosure of revenue and customs information relating to a person under the FOIA. This amendment is contained in section 19(4) of the Borders, Citizenship and Immigration Act 2009. What this means is that access to customer specific information is excluded from the FOIA.
22. The relevant part of paragraph 110 of the explanatory notes to CRCA states: '*The term "person" includes both natural and legal persons, and, for example, the tax affairs of a limited company are also protected by the provisions of the subsection.*' This does not mean that only limited companies count as legal persons. It encompasses all legal persons, including public limited companies such as British Airways.
23. To respond to any of the questions posed would inevitably confirm or deny whether the public authority holds the information of the type

sought in relation to British Airways. That would contravene section 18(1) CRCA, hence why the request was denied on the basis of section 44(2).

*Commissioner's position*

24. The Commissioner is satisfied that the requested information, if held, would be held by the public authority in connection with its functions.
25. The Commissioner accepts that disclosure under the FOIA is not a function of the public authority described in section 5 CRCA. It is therefore not a function envisaged by section 18(2)(a)(i). The Commissioner further accepts that the exceptions at sections 18(2) and (3) should be disregarded (for the purposes of responding to a request under the FOIA) in any event by virtue of the amendment contained in section 19(4) of the Borders, Citizenship and Immigration Act 2009.
26. The Commissioner accepts that the term *person* does not exclude a public limited company like British Airways. It includes both natural and legal persons. Legal persons include public limited companies and paragraph 110 of the explanatory note clearly does not limit the definition to limited companies.
27. The Commissioner also accepts that responding to any part of the request would inevitably confirm or deny whether the public authority holds the type of information sought.
28. The Commissioner therefore finds that the public authority was entitled to rely on the exemption at section 44(2) to refuse to confirm or deny whether it held the requested information.

## Right of appeal

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29. 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)

30. 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.
31. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**