

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 March 2014

**Public Authority:** H M Revenue and Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

#### **Decision (including any steps ordered)**

---

1. The complainant has requested the amount of VAT that HM Revenue and Customs (HMRC) estimated it might have to refund to investment trust companies depending on the result of ongoing litigation for the recovery of overpaid VAT. HMRC originally withheld the information under sections 31(1)(c) and (d) on the basis that its disclosure would prejudice the course of justice and the collection of taxes respectively. During the Commissioner's investigation HMRC also applied section 42(1) on the grounds the information was also protected by legal professional privilege.
2. The Commissioner's decision is that HMRC has correctly withheld the information under section 42. Therefore he has not gone onto to consider the application of the exemptions provided by section 31.
3. The Commissioner does not require HMRC to take any action in respect of this complaint.

#### **Request and response**

---

4. The complainant originally made his request for information in a letter to HMRC on 14 December 2012. In that letter he outlined various law suits in which investment trust companies were seeking refunds of the VAT they had paid on the fund management services they had received.
5. There were two different interpretations that could be placed on the request. HMRC only recognised one interpretation. This led to a complaint being made to the Commissioner. That complaint resulted in a

decision notice being issued under the reference FS50487149. During the investigation that led to that decision notice the Commissioner wrote to the HMRC on 12 July 2013. In that letter the Commissioner explained what the complainant's intended meaning of the request was and that the Commissioner considered that this alternative interpretation was an objective one. HMRC then proceeded to respond to the request in accordance with the interpretation as clarified by the Commissioner.

6. In his original request the complainant referred to a number of law suits and asked for,

"... the maximum HMRC will have to return to investment funds, investment trusts and pension funds in overpaid VAT stemming from these issues."
7. In his letter of the 12 July 2013 the Commissioner provided further clarification as to what information was being sought. He explained that the complainant required an estimate or 'ball park figure' of the total amount of money that HMRC might have to refund in light of the precedent set by the court cases.
8. Acting on this interpretation of the request HMRC responded to the clarified request on 9 August 2013. It refused to provide the estimate citing the exemptions provided by sections 31(1)(c) and (d), prejudice to the administration of justice and prejudice to the assessment or collection of tax respectively, as its basis for doing so.
9. Following an internal review HMRC wrote to the complainant on 13 September 2013. It maintained its original position.
10. During the Commissioner's investigation HMRC also applied section 42(1) on the grounds that the information was subject to legal professional privilege. It advised the complainant of this development on 7 February 2014.

## **Scope of the case**

---

11. The complainant contacted the Commissioner 23 September 2013 to complain about the way HMRC had responded to his clarified request for information. At that stage HMRC had only applied sections 31(1)(c) and (d).
12. In respect of section 31(1)(c) the complainant argued that disclosing an estimate of the total amount that may have to be refunded would not in itself disclose any of HMRC's lines of defence in the ongoing litigation. Furthermore, since, he argued, the claimants would already have

calculated the sums they believed HMRC owed them, the disclosure could not pre-empt the proper process of the appeals. He therefore refuted HMRC's argument that the disclosure would prejudice the administration of justice.

13. In respect of section 31(1)(d) the complainant said that he failed to understand how the disclosure could prejudice HMRC's ability to collect tax.
14. Following HMRC's application of section 42(1) – legal professional privilege, on 7 February 2014, the complainant argued that legal professional privilege only protected communications between lawyers and their clients. The figure itself would not constitute a communication, nor would it have been produced by lawyers. He argued that the figure was instead a composite of many thousands of pieces of information and was not of any relevance to individual law suits. Therefore he did not accept that the information could attract legal professional privilege.
15. The Commissioner considers that the issue to be decided is whether any of the exemptions cited by HMRC ie sections 31(1)(c) and (d) and section 42(1), are engaged and, if so, whether the public interest favours maintaining those exemptions.
16. Section 42 is a class based exemption whereas the section 31 exemptions are prejudice based. Furthermore although all three exemptions are subject to the public interest test, it has been established that there is an inbuilt public interest in maintaining section 42(1). In light of the above the Commissioner has decided to consider HMRC's application of section 42(1) first.

## **Reasons for decision**

---

### **Section 42(1)**

17. Section 42(1) of FOIA provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
18. Section 42 is a class based exemption. That is the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply

has be capable of attracting legal professional privilege for it to be exempt. There is no need to consider the harm that would arise by disclosing the information. However, as the exemption is subject to the public interest test this issue will be considered later.

19. The purpose of legal professional privilege is to ensure the confidentiality of communications between a legal adviser and their client. This allows the client to set out in full all the issues relevant to the legal problem that they need advice on and allows the lawyer to provide as full advice as possible.
20. There are two types of privilege and HMRC has argued that the requested information is contained in documents attract litigation privilege. Litigation privilege applies to confidential communications between a lawyer and their client made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. The information must have been created for the dominant purpose of giving or obtaining legal advice for use in preparing for that litigation.
21. HMRC has argued that the requested information is contained in a report detailing the possible financial consequences of the different potential outcomes to the ongoing litigation relating to the recovery of overpaid VAT. The report was produced by HMRC's own staff based in the Knowledge Analysis and Information Directorate. It was produced once the litigation concerning the repayment of VAT was underway and formed the main part of the sensitive case brief that was provided for this litigation. Sensitive case briefs are commissioned by HMRC's Solicitor's Office and their purpose is to inform both HMRC's internal and external lawyers of all the issues relating to the litigation in question.
22. HMRC has told the Commissioner that the dominant purpose of that report was to form part of the sensitive case brief for the VAT litigation. Its inclusion in the briefing ensured that its lawyers were fully aware of the importance and sensitivity of the cases. This would help shape the legal advice provided and could inform which counsel is appointed to defend the legal action being taken against HMRC. HMRC has acknowledged that information from a sensitive case brief can also be used for other purposes in some circumstances. However it maintained its position that the reason the estimated figure was produced, and the dominant purpose that it is subsequently being used for, is to inform HMRC's legal advisers.
23. Before looking in more detail at whether the report does attract privilege it is appropriate to consider whether the requested information only exists as part of that report. The Commissioner recognises that an argument could be made that the requested figure could be estimated by trawling through all the relevant VAT returns held by HMRC and

extracting the amount of VAT paid in each case. These values could then be aggregated to produce an estimate. This mathematical exercise could be carried out independently of any legal action and would use information which existed prior to any litigation being contemplated. There is an argument therefore that an estimate is held that is not subject to legal professional privilege. Similarly it could be argued that an estimate could be derived from any claim forms submitted by those wishing to recover the VAT which they believe has been overpaid.

24. However the Commissioner considers that it is implicit that any estimate will contain an element of judgement as to what should be included when calculating the figure and how accurate the estimate needs to be. Having looked at the figures contained in the report it is clear that the estimate is based on a number of assumptions, including the different possible outcomes to the litigation in progress. It is not a simple exercise in addition. It is the result of judgement being applied to existing and incomplete data to create an estimate which represents a new piece of information. It is this estimate that has been requested. Therefore the Commissioner is satisfied that the requested information only exists, or was only produced, as part of the report which forms the basis of the sensitive case brief.
25. It is now necessary to look at whether the report can attract legal professional privilege in more detail.
26. The report as provided to the Commissioner is in the form of a memo. That memo was sent by the author of the report to the officer which commissioned it and has been copied to a limited number of other parties. None of these individuals are legal advisers. However HMRC has advised the Commissioner that the individual who commissioned the report is a tax professional responsible for providing technical advice to internal and external lawyers. The report's author has the role of analysing tax issues including the assessment of the implications of major VAT litigation and in providing advice on the preparation of sensitive case briefs. The Commissioner is satisfied that the report was produced primarily for inclusion in the sensitive case brief. As such the HMRC staff involved were, collectively, acting as clients preparing information for the purpose of instructing and obtaining legal advice from their lawyers.
27. Although, strictly speaking, such information does not actually have to be sent to legal advisers in order to attract privilege, the Commissioner is clear that the sensitive case brief, of which the report formed part, was sent to HMRC's lawyers. In light of this the Commissioner is satisfied that the estimate forms part of the communications provided by the HMRC, as a client, to its legal advisers for the dominant purpose of obtaining legal advice.

28. It is clear from the content of the report containing the estimate that it was produced following the commencement of legal action against HMRC. The Commissioner is therefore satisfied that the information is capable of attracting litigation privilege. Litigation privilege is potentially wider than the other strand of legal professional privilege, advice privilege, in that it can be applied not only to communications solely between client and lawyer, it can also apply to information and evidence provided by third parties for the purpose of obtaining legal advice. However the Commissioner is satisfied that the estimate forms part of a communication between client and lawyer and so the distinction between the two forms of privilege has little bearing in this particular case.
29. Having established that the estimate was created for the dominant purpose of obtaining legal advice, that it formed part of a communication between HMRC as clients and its internal legal advisers, and that it was produced whilst litigation is ongoing, it is now necessary to consider whether the information is still confidential.
30. HMRC has told the Commissioner that the report has not been disclosed to the public or any third party. Access to the document is restricted to HMRC solicitors and those senior HMRC clients involved in the litigation.
31. As discussed at paragraph 22 HMRC has advised the Commissioner that there is the potential for information from a sensitive case brief to feed into other processes for example financial reports. However HMRC has stressed that where this happens access is still restricted to those officials with a legitimate business need for the information. The Commissioner can understand that where litigation may have important consequences for other business areas within HMRC it would be prudent to provide officials from those areas with access to relevant information from the sensitive case brief. The Commissioner is satisfied that even if this had happened in this case, it would not deflect from the fact that the information was created for the dominant purpose of obtaining legal advice and that certainly whilst litigation was ongoing, the information could still attract legal professional privilege.
32. The Commissioner is satisfied that estimate requested forms part of a communication produced for the dominant purpose of obtaining legal advice at a time when litigation was ongoing. Furthermore the Commissioner is satisfied that the information remains confidential. He is therefore satisfied that it attracts legal professional privilege and that it is exempt information under section 42(1). However section 42 is subject to the public interest test which must now be considered in order to determine whether the information can be withheld.

### **Public interest test**

33. The public interest test is set out in section 2 of FOIA. It requires the public interest in maintaining the exemption to be balanced against the public interest in disclosing the information. Only if the public interest in preventing the harm that would be caused by disclosure outweighs the value in disclosing the information, can the information be withheld.
34. It has been established by the Tribunal that there is a general public interest in maintaining the exemption and the principle that client/lawyer communications should remain confidential. This public interest will always be strong and it reflects the importance placed on individuals feeling free to discuss any legal problems they have with their legal adviser in a full and frank manner.
35. The information that has been requested represents the worst case scenario, the maximum amount of money which HMRC estimates it could be liable for. The Commissioner can understand why HMRC felt it necessary to include such information in any brief to its legal team. The estimate explains what is at stake and hence the importance of the litigation. This increases the public interest in maintaining the exemption. It is important that government departments feel able to fully brief their legal teams in order to obtain comprehensive legal advice.
36. HMRC has also argued that the public interest in maintaining the exemption is heightened because the litigation which the estimate relates to is still ongoing. It has pointed out that so far the litigation has only dealt with points of legal principle. It has not dealt with quantum, the amount of money that HMRC could be liable for. If HMRC's own estimate of the maximum it may be liable for was disclosed, at this stage, it could undermine HMRC's ability to properly defend its position.
37. The complainant has argued that such an overarching estimate would have little bearing on individual cases. He has further argued that individual litigants would have already calculated the amounts they believe they are owed and would not be guided by a global estimate.
38. The Commissioner can see some merit in the complainant's argument. Nevertheless he does find that the estimate could potentially provide assistance to claimants. HMRC has advised the Commissioner that the majority of claimants are being represented by a very limited number of legal firms. This increases the value of the estimate because the claimant's lawyers will be in a better position to analyse that estimate by comparing it to the total sum they intend claiming on behalf of their clients.
39. Furthermore it is possible that once the Court has settled the legal principles it could instruct the parties to settle the quantum. This

process would involve negotiation between the parties. Therefore HMRC would be disadvantaged if it had already revealed how much it believed it could have to pay out.

40. The Commissioner accepts that disclosing the estimate could disadvantage HMRC's position if it has to settle the claims against it. Since the settlement would be from what are currently public funds, there is a public interest in protecting those funds.
41. When looking at the public interest in favour of disclosure HMRC has acknowledged that there is a public interest in ensuring it is accountable for the quality of its decision making. Disclosing information that would show that its decision making is based on solid legal advice is part of that accountability.
42. As well as contesting HMRC's argument that disclosing the information could impact on individual law suits, the complainant has raised issues relating to the amount of money at issue and the number of people effected.
43. Conceivably the law suits involve large amounts of money. It can be argued that where large amounts of money are involved there is an increased public interest in public authorities being accountable for their decision making and there being greater transparency over the advice relied on. This principle was established in a Tribunal case (*Mersey Tunnel Users' Association v Information Commissioner and Merseytravel* EA/2007/0052, 15 February 2008). In that case the issues on which advice was sought, was how the tolls collected from tunnel users could be spent. There is a difference between that case and the current one. In this case disclosing the information could have a direct impact on the monetary sum at stake whereas this was not so in the Mersey Tunnel case. Nevertheless, both cases concern how large amounts of money held by public authorities should be distributed. Therefore the Commissioner accepts that the complainant's argument does carry some weight.
44. The complainant has also argued that the litigation will impact on a large number of people and that this increases the public interest in disclosing the information. The Commissioner has not been informed of how many people could be affected. However he assumes that there will be a significant number of people affected bearing in mind the numbers who are likely to have invested in the investment funds that are currently taking legal action against HMRC or may do depending on the results of that litigation.
45. The Commissioner has also considered the actual matter to which the legal advice relates. The importance of people being able to obtain



comprehensive legal advice is greatest where an individual's liberty or protection is at issue. For example, there is a greater public interest in maintaining the principle of legal professional privilege where advice is being sought in respect of a child protection case. It follows there is less public interest in preserving the concept where the legal advice relates to more administrative procedures such as the collection of VAT.

46. The Commissioner would accept that there is a public interest in individuals obtaining any refunds of VAT that they are entitled to. Disclosing the estimate may encourage others to pursue claims against HMRC. However HMRC advised the Commissioner that it already publishes details of the circumstances in which, potentially, claims may be bought. These details are published on HMRC's website. HMRC argues, and the Commissioner accepts, that this is a better means of alerting people to the issue than disclosing the requested estimate.
47. In balancing the public interest arguments for and against disclosure the Commissioner has given particular weight to the fact that disclosing the information has the potential to affect the outcome of ongoing legal action. Disclosing the information in these circumstances would undermine the confidence that people would have in their ability to have free and frank discussions with their legal advisers.
48. The legal process currently underway provides the appropriate means of determining whether HMRC is liable for any overpaid VAT and, if so, to settle any claims. That process contains the necessary safeguards to ensure the matter is settled fairly. It would not be in the public interest to undermine that process by disclosing the estimate contained in HMRC's brief to its legal team.
49. In light of this the Commissioner finds that the public interest favours maintaining the exemption.
50. The Commissioner does not require HMRC to take any further steps in this matter.

## Right of appeal

---

51. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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**