

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2014

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

Decision (including any steps ordered)

1. The complainant has requested export information from HM Revenue and Customs (HMRC) relating to a named charity for years 2011 and 2012. HMRC stated, in accordance with FOIA section 44(2), that it could neither confirm nor deny if any information was held within the scope of the request.
2. The Commissioner's decision is that HMRC was entitled to refuse to confirm or deny whether it holds the requested information on the basis of the exemption at section 44(2).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 16 May 2014 the complainant wrote to HMRC and requested information of the following description:

"...the export entry numbers and the details of any consignments that [named charity] sent to Sierra Leone in calendar years 2011 and 2012"

5. HMRC responded on 5 June 2014. It refused to confirm or deny, in accordance with FOIA section 44(2), that it held the requested information.

6. Following an internal review, HMRC wrote to the complainant again on 14 July 2014. It upheld its original decision to rely on section 44(2).

Scope of the case

7. The complainant contacted the Commissioner on 22 July 2014 to complain about the way his request for information had been handled. He further contacted the Commissioner on 30 September 2014 to advise of his view that, as the charity in question was an unincorporated association, HMRC was not entitled to rely on FOIA s44.
8. The Commissioner considers the scope of the investigation is to determine whether HMRC 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

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. This is commonly referred to as 'the duty to confirm or deny'.

10. Section 44 of 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)."

11. HMRC has asserted that in this case it is excluded from complying with the duty to confirm or deny whether it holds the information requested because to do otherwise is prohibited under the Commissioners for Revenue and Customs Act 2005 (CRCA).

12. 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".

13. Section 18(2)(a)(i) states:

"But subsection (1) does not apply to a disclosure which is made for the purposes of a function of the Revenue and Customs...."

14. Section 23 states amongst other things:

"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...."

15. The complainant has submitted that the requested information relating to a named charity's export activities is requested in pursuit of national non-domestic rates. The complainant asserts that, as a tax, it is in line with the purpose for which HMRC holds the information. However, it is his view that HMRC appears to have interpreted the FOIA legislation to suit its own purposes and that this seems incompatible with the way local authorities are required to comply.

16. In its initial response to the complainant, HMRC explained that section 44 of the FOIA applies when the requested information, if held, would be prohibited from disclosure under any enactment. It went on to explain that the relevant enactment in this case is the Commissioners for Revenue and Customs Act 2005 (CRCA). The relevant section of this Act is 23(1).

17. HMRC has further explained that in order to determine whether information is captured by section 23(1) there are two relevant questions:

- Would the requested information be held in connection with a function of HMRC?; and
- Would the information relate to a "person" who could be identified from the information requested?

18. In this case HMRC advised that the answer to both these questions was yes, and therefore the exemption at section 44 FOIA is engaged. Furthermore, HMRC's statutory duty of confidentiality (at section 18(1) CRCA) removes the possibility of any disclosure on a discretionary basis.

19. In its response, HMRC has explained to the complainant that the explanatory notes to the CRCA clarifies that the term "person" includes legal entities such as companies, trusts and charities, as well as living individuals.
20. Where confirming whether or not the requested information is held would in itself tell the requestor something about the "person" then section 44(2) FOIA removes the section 1(1)(a) 'duty to confirm or deny'.
21. In his internal review request, the complainant rejected HMRC's interpretation of how the FOIA interacts with the CRCA. He goes on to state that the explanation of the legislation and the definition of "person" in the explanatory notes allows HMRC, to his mind, a blanket exemption from FOIA. He further asserts that this cannot have been the intention of Parliament.
22. The complainant challenged the application of section 44 of the FOIA and stated that he did not accept HMRC's interpretation of section 23 of the CRCA was correct because it was relying upon a definition contained within explanatory notes. He argued these are not authoritative, do not form part of the CRCA, have been written by HMRC and have not been endorsed by Parliament.
23. The complainant further stated that it was the view of the organisation on whose behalf the request was made that a correct interpretation of the CRCA should read 'person' in the light of the Data Protection Act; it should relate to a living human being who could be identified. He argues that this would then be consistent with the way FOIA operates in other areas of public administration.
24. The complainant concludes that HMRC is attempting to frame its guidance to provide a universal opt out from FOIA.
25. In its response to these points, HMRC has acknowledged that the explanatory notes do not have legal effect but that they are consistent with the definition of "person" contained within schedule 1 of the Interpretation Act 1978:

"Person" includes a body of persons corporate or unincorporate'
26. It is HMRC's position that where there is no specific separate interpretation set out for the CRCA, then the standard interpretation in the 1978 Act applies.
27. With regard to the view proffered that HMRC has a 'universal opt out' from the FOIA, HMRC has explained that the clear intention of

Parliament was to remove information that HMRC holds about its customers from the right of access under FOIA. In order to substantiate this, HMRC cited a statement made by Dawn Primarolo, the then Paymaster General.

28. It is the Commissioner's view that the request clearly relates to information which, if held, would relate to a function of HMRC.
29. The Commissioner accepts that disclosure under the FOIA is not a function of HMRC as set out in section 5 of 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. What this therefore means is that access to customer specific information is excluded from the FOIA. In this case the customer is the charity named in the request.
30. With regard to the definition of the term 'person', the Commissioner accepts that the term does not exclude a charity such as the one referred to in the complainant's request. It includes both natural and legal persons. With specific regard to the explanatory notes cited, the Commissioner accepts HMRC's position set out at paragraphs 25 and 26 above.
31. With regard to the complainant's assertion that the charity in question is an unincorporated association and therefore HMRC cannot rely on the statutory barrier to disclosure, HMRC has advised that in the circumstances this has no bearing on the application of section 44 of FOIA as s23 of CRCA still applies.
32. It is the Commissioner's position that the refusal notice issued by HMRC and its subsequent internal review response adequately explained the position as set out in section 23(1) and 18(1) CRCA. Based on all of the evidence before him, the Commissioner's position is that HMRC was entitled to rely on the exemption at section 44(2) FOIA to refuse to confirm or deny whether it held the requested information.

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,
LEICESTER,
LE1 8DJ

Tel: 0300 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF