

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2015

Public Authority: Her Majesty's Revenue and Customs

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information about a meeting between [named company] and Her Majesty's Revenue and Customs (HMRC) to discuss the provision of insurance to tax advisers and in particular one named company. HMRC neither confirmed nor denied that it held information falling within the scope of the request citing FOIA section 44(2).
2. The Commissioner's decision is that HMRC is entitled to rely on section 44(2) to neither confirm nor deny whether it holds the requested information. He does not require any further steps to be taken.

Request and response

3. On 9 February 2015, the complainant wrote to HMRC and requested information in the following terms:

"It is our understanding that [named company] met with HMRC to discuss the provision of insurance to tax advisers, in particular, [second named company]. Following these discussions, [named company] issued a circular which placed requirements on syndicates who wished to underwrite certain tax and wealth strategy schemes. We therefore request copies of the following: - All correspondence between [named company] and the HMRC between the period of 1 January 2012 and 31 December 2014 relating to tax and wealth schemes and/or the issuance

of a directive and/or imposing requirements for syndicates underwriting certain tax schemes; - Any related internal correspondence between the period of 1 January 2012 and 31 December 2014; and - Any notes and/or memos taken of any meetings which took place between the HMRC and [named company] between the period of 1 January 2012 and 31 December 2014 to discuss tax and wealth schemes and/or the issuance of a directive and/or imposing requirements for syndicates underwriting certain tax schemes."

4. On 9 March 2015 HMRC responded.
5. It refused to confirm or deny whether it held the requested information. It cited the following exemption as its basis for doing so: section 44 – prohibitions on disclosure.
6. HMRC explained to the complainant that section 44 applies when the requested information, if held, would be prohibited from disclosure under any enactment. The relevant enactment, it explained, is section 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA). HMRC further clarified that in order to determine whether information would be covered by section 23(1) CRCA, two questions were relevant:
 - 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?
7. HMRC asserted that as the answer to both questions was yes, then section 44(1)(a) of the FOIA is engaged and HMRC's statutory duty of confidentiality set out at section 18(1) of the CRCA removes any possibility of disclosure on a discretionary basis.
8. The complainant requested an internal review on 16 March 2015. HMRC did not reply to the request for an internal review.

Scope of the case

9. The complainant contacted the Commissioner on 6 May 2015 to complain about the way the request for information had been handled.
10. The Commissioner considers the scope of his 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

11. 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'.

12. 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)."

13. 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).

14. 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".

15. 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...."

16. 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...."

17. HMRC asserts that in considering whether or not requested information is covered by CRCA 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. HMRC's position in this case is that the answer to both these questions is yes and accordingly, section 18(1) CRCA applies.
19. HMRC has confirmed, in its submission to the Commissioner, that the term "person" includes legal entities such as companies, trusts and charities, as well as living individuals. This definition stems from Schedule 1 of the Interpretation Act 1978.
20. HMRC set out that section 23 CRCA was amended in 2009 by section 19(4) of the Borders Citizenship and Immigration Act 2009. This amendment clarified that the exceptions to HMRC's duty of confidentiality set out in sections 18(2) and (3) of CRCA are to be disregarded when considering disclosure under FOIA of Revenue and Customs information relating to a person.
21. It is HMRC's position that either confirming that it did hold information within the scope of the request, or denying that it did not, would lead to disclosure of information relating to a person i.e. about a named company which is prohibited by HMRC's statutory duty of confidentiality.
22. In its response to the Commissioner, HMRC has noted that the complainant had suggested that the identity of any "person" could be redacted. However, HMRC notes that where a request names a "person", even a redacted response would lead to identification of that "person".
23. It is the Commissioner's view that the request clearly relates to information which, if held, would relate to a function of HMRC.
24. The Commissioner accepts that disclosure under the FOIA is not a function of HMRC as set out 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. What this therefore means is that access to customer specific information is excluded from the FOIA. In this case the customer is the named company.

25. It is the Commissioner's position that the refusal notice issued by HMRC 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.

Other matters

26. The complainant requested an internal review on 16 March 2015 following refusal of the requests. A further letter was sent on 16 April 2015. HMRC did not respond to the request for an internal review.
27. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.
28. As the Commissioner has made clear in his '*Good Practice Guidance No 5*', he considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner is of the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
29. In this case, no response was issued.
30. HMRC has explained that the lack of response was an administrative oversight with two separate units thinking the other was completing the review. The Commissioner accepts this explanation and notes more generally that HMRC is being proactive in putting in place measures to ensure that such requests are dealt with appropriately.

Right of appeal

31. 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

32. 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.
33. 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
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