

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2017

Public Authority: Her Majesty's Revenue & Customs (HMRC)
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information from HMRC about exchanges of information between the United Kingdom and countries/territories with which HMRC has agreements covering such exchanges. HMRC refused to comply with the request, relying on section 14(1), vexatious in respect of the burden imposed on HMRC.
2. The Commissioner's decision is that HMRC has incorrectly relied on section 14(1) to refuse this request and it is now required to issue a fresh response in accordance with the FOIA without relying on the procedural exemption provided by section 14(1).
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 12 April 2016, the complainant wrote to HMRC and requested information in the following terms:

"I am interested in finding out how many exchanges of information have been made between the UK and the countries and territories with

which it has agreements covering such exchanges. In the first place I'd be grateful if you could tell me if this information, covering I understand more than 100 agreements, is collated. If it is, could you please send me the data covering the latest three years for which it is available.

If it is not, could you please let me have - for the latest three years for which information is available - the numbers of exchanges of information made under double taxation agreements and/or tax information exchange agreements between the UK and

- each overseas territory*
- each Crown Dependency; and*
- Switzerland, Liechtenstein, Gibraltar, Panama, Singapore, Monaco*

You provided me with information of this sort in 2011 - though not covering precisely these countries and territories in 2011. I will forward the previous response for your information."

5. HMRC responded on 10 May 2016. It split the request into two parts. It refused to comply with the first part in reliance on section 14(1) FOIA (vexatious request). Specifically on the grounds that compliance would impose a significant burden on HMRC. It relied on section 27(1)(a) FOIA (exemptions relating to international relations) in respect of the information held within the scope of the second part of the request but advised that more time was needed to consider the balance of the public interest.
6. The complainant wrote to HMRC on 11 May 2016 asking for an internal review of its application of section 14(1) in respect of part one of the request. Regarding the second part of the request, he asked HMRC why section 27 applied in this case but had not applied to his request in 2011.
7. On 22 September 2016, HMRC responded to the internal review request and upheld its position with regard to section 14(1).
8. On 23 September 2016, HMRC wrote to the complainant setting out its final position with regard to the second part of the request. It concluded that the balance of the public interest lay in maintaining the exemption contained at section 27(1)(a). It set out the process for seeking an internal review in the event that the complainant was dissatisfied with the response.

Scope of the case

9. The complainant contacted the Commissioner on 10 October 2016 to complain about the way his request had been handled. He asked the Commissioner to investigate HMRC's application of section 14(1).
10. Although the complainant does not want the Commissioner to investigate the application of section 27 to the second part of the request, he has set out that this does not mean that he agrees with, or accepts, HMRC's position in respect of the application of section 27.
11. The complainant has asserted that he disagrees with the application of section 14(1) because the jurisdictions in question have no expectation that the information would be withheld and that previously, similar information has been disclosed without any apparent objections.
12. The Commissioner considers the scope of this investigation is to determine whether HMRC is entitled to rely on section 14(1) to refuse the first part of the request.

Reasons for decision

13. It is HMRC's position that the request is vexatious on the basis that it is burdensome. The Commissioner accepts that a request can be vexatious where it would impose a grossly oppressive burden due to activities not covered by section 12. This means that although it would not exceed the appropriate limit to identify, locate and retrieve the requested information, a public authority can, for example, refuse a request due to the cost of considering the application of exemptions, or of redacting the exempt information. However the threshold for refusing a request on such grounds is a high one.
14. In its initial response to the complainant, HMRC has set out that whilst the information requested at part one of the request could be collated within the appropriate cost limit, responding to the request would be overly burdensome due to the need to seek the views of the relevant third parties involved which number 142.
15. In its internal review response, HMRC has clarified its position, setting out that it is important for HMRC to make enquiries as to the opinion of other jurisdictions which may have reasons for not wanting disclosure of the requested information. It has also stated that even where there are no objections, the other authority will still always want to agree the figures before they are released. HMRC has explained that aligning the figures is a significant and resource intensive piece of work for both HMRC and the other jurisdiction.

16. It is HMRC's position that in the event of a third party robust argument against disclosure, HMRC would have a duty to consider whether the requested information may be exempt under FOIA. In this case, HMRC suggested that section 27 may apply. In these circumstances, HMRC explained to the complainant that the burden of HMRC consulting with 142 third parties, to agree the information and its disclosure would represent a significant burden.
17. In its submission to the Commissioner, HMRC has set out that in responding to this request for information, it must consider the impact on international relations and whether it would be appropriate to rely on section 27 to refuse the request.
18. HMRC has set out that some jurisdictions' default position is that the information cannot be disclosed for policy reasons or because of its legal interpretation of the confidentiality of that information. It has expressly set out that all jurisdictions will wish to agree the number of exchanges. In these circumstances, HMRC's position is that the information could not be disclosed until it had made contact with each of the 142 jurisdictions to obtain their views on disclosure and to agree the number of exchanges.
19. HMRC has stated that the different methods of counting coupled with the sheer number of requests for comparison over the period in question mean intensive work for both HMRC and the third party jurisdiction.
20. The Commissioner has considered HMRC's position in relation to the burden caused by this request and will turn first to the burden presented by the need to agree the figures.
21. It is the Commissioner's position that any request for information is a request for the information which is held by a public authority at the time of that request and not a request for information for revised figures held at a date after the request and following third party consultation. She also notes here that the question of whether the records held are in fact accurate is not a matter that falls within the remit of her investigation.
22. Whilst she accepts the position set out by HMRC that different jurisdictions may count exchanges in different ways, the Commissioner does not accept that this can have any bearing on the information held at the time of the request. In other words, if HMRC has recorded a request for five pieces of information as relating to a single exchange within the relevant exchange agreement in place with a particular country/territory, but the country/territory has recorded it as five exchanges then this recording anomaly cannot be considered relevant in terms of responding to the FOIA request.

23. It is clearly the case that how the exchange numbers are recorded is a matter for each individual jurisdiction thus creating the position that each jurisdiction is potentially recording figures differently. The fact that there is no uniform approach to the recording of the figures suggests that not only is there no need to agree the figures in order to comply with the request under FOIA, but agreeing them would serve no useful purpose in responding to the request as it could be the case that jurisdiction number 1 records their figures in the same way as HMRC whilst jurisdiction number two does not and jurisdiction number three may record their figures in a different way from both HMRC and the other jurisdictions involved.
24. It is key to note that this request is about the figures held by HMRC at the time of the request and that the FOIA does not provide for consultation to ensure that the figures are the same as those held by a third party nor does it provide for information to be amended or agreed prior to disclosure. It is of course open to a public authority to provide a supporting background explanation setting out that figures are counted in different ways by different jurisdictions.
25. The Commissioner does not therefore accept that HMRC is entitled to rely on section 14(1) on the grounds that it would be significantly burdensome to agree the requested figures with the countries and territories in question.
26. Although the Commissioner has not considered the application of section 27 to the second part of the request, it would be remiss to ignore the fact that HMRC applied section 27 to this part of the request following consultation with other jurisdictions, albeit the number consulted was fewer.
27. HMRC consulted 15 jurisdictions in respect of part two of the request; this consultation included seeking agreement of the figures held by HMRC.
28. Following the consultation, HMRC explained that some jurisdictions replied very quickly whilst some did not and at the time of providing its submission to the ICO, one had still not responded. Of the 14 who had responded, four had expressed a 'desire' that the information was withheld, six had agreed to disclosure and had agreed the figures and four had agreed to disclosure but were still in discussion about the figures.
29. In considering the burden on HMRC in these circumstances in relation to the first part of the request, the Commissioner considers that this would involve writing to each of the jurisdictions in question but considers that

this could be done via a standard letter given that figures would not need to be agreed.

30. Although some responses may be delayed, the Commissioner notes that any delay does not represent a burden to HMRC as there is no action being undertaken by HMRC. Although there may be a need to send reminders to prompt a response, this would again be done via standard letters. Once the responses were received, HMRC could immediately rule out jurisdictions which agree to disclosure and would then need to consider what, if any exemptions applied in instances where a jurisdiction did not agree to disclosure. In terms of considering appropriate exemptions, HMRC has set out to both the Commissioner and the complainant that the exemption which would be under consideration in this case is section 27.
31. Mindful of the fact that she does not consider that agreeing the figures can form part of the arguments supporting section 14 in this case, the Commissioner does note that in considering the application of section 27 to part two of the request, of the 14 responses received, 10 jurisdictions had agreed to disclosure and that this therefore represents in the region of 66% of the 15 jurisdictions consulted.
32. The Commissioner notes that following this consultation, HMRC relied on section 27 to refuse part two of the request. Although a consultation process is referenced in the part two response to the complainant, there is no detail in that response and HMRC has relied on generic arguments to refuse this part of the request under section 27. This in itself suggests that there was no need to obtain agreement for the figures as even where figures and disclosure were agreed, HMRC did not opt for disclosure but relied on section 27 to refuse the entire request. In these circumstances, it appears that even if a consultation process was necessary it is likely that it would not require consultation with all 142 countries given that HMRC may take a blanket approach in any final response.
33. As this decision notice has set out, the threshold for refusing a request on the basis that compliance would impose a significant burden is high and in all of the circumstances set out by HMRC, the Commissioner does not consider that the threshold has been met in this case or even that the position is finely balanced.
34. HMRC has not satisfied the Commissioner that complying with the request is grossly oppressive. HMRC has in fact made it clear that it cannot rely on section 12 to refuse the request as it has explained that it could collate and release the number of exchanges made with each jurisdiction very simply.

35. It is the Commissioner's position that in agreeing to exchange information with other jurisdictions, there is no agreement on how exchanges are recorded and that this is an issue which would be more appropriately addressed outside of the FOIA. In terms of handling the request under FOIA, any request made to a public authority is a request for information held at the time of the request and the fact that it may or may not match information held by a third party, due to the manner in which that information is recorded, is not relevant in respect of the handling of the request under FOIA. Therefore, agreeing the recorded number is not a function/process which can be relied upon to support the argument that the request is burdensome.
36. Essentially therefore in terms of the application of section 14 the remaining argument put forward by HMRC involves only the consultation process seeking agreement to disclose or not and determining whether section 27 applies. The Commissioner considers that this process is about how HMRC may respond to the request rather than the request being so burdensome that HMRC need not comply with it. For this reason and those set out above, the Commissioner does not consider that consulting 142 jurisdictions, even if consultation with every jurisdiction were necessary, represents a burden which is so significant or grossly oppressive to HMRC that it is prohibitive in terms of complying with the request. Accordingly, she considers that HMRC has incorrectly relied on section 14(1) to refuse to comply with the request.

Other matters

37. The Commissioner is concerned by HMRC's handling of this request.
38. It is her position that the request was framed in such a way that HMRC was clearly only obliged to respond to either part one or part two of the request. However, HMRC responded to both parts of the request providing a refusal notice for each and providing for an internal review following each refusal.
39. The Commissioner is also concerned by HMRC's delay in responding to her office in this case with a submission being provided some three weeks after the initial deadline. It is her position that having relied on section 14(1) to refuse a request, any public authority should be able to provide a submission to support its position within the normal 20 working day (four week) deadline and should certainly not require seven weeks to do so.
40. She would ask HMRC to ensure that in future, submissions are provided to her office in a timely manner.

Right of appeal

41. 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: 0870 7395836

Email: GRC@hmcts.gsi.gov.uk

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

42. 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.

43. 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

Terna Waya
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