

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2018

Public Authority: Her Majesty's Revenue and Customs (HMRC)

Address: 100 Parliament Street
London

Decision (including any steps ordered)

1. The complainant has requested information from HMRC about Conditional Share Dividend Bonus arrangements. HMRC refused the request relying on section 44(1)(a). During the course of the Commissioner's investigation, HMRC additionally sought to rely on section 31(1)(d).
 2. The Commissioner's decision is that: section 31(1)(d) is not engaged, section 44(1)(a) is not engaged in relation to parts one and two of the request, and the information within the scope of part 3 of the request was correctly withheld. The decision in relation to part 3 of the request is set out in detail in a confidential annex which shall be made available to the public authority only.
 3. The commissioner requires HMRC to disclose the information requested at parts one and two of the request only.
 4. 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.
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Request and response

5. On 25 July 2017, the complainant wrote to HMRC and requested information in the following terms:

*"1. The total value of tax and NI for Conditional Share Dividend Bonus arrangements served with FNs and APNs already collected by HMRC where the companies have accepted the notices **and not made representations***

*2. The total value of tax and NI for Conditional Share Dividend Bonus arrangements served with FNs and APNs **where the companies have made representations.***

3. After the deadline for responding to the notices has passed (10 August in our case) the total value of tax and NI for Conditional Share Dividend Bonus arrangements collected by HMRC."

6. HMRC responded on 21 August 2017. It refused the request in its entirety relying on section 44(1)(a).
7. The complainant requested an internal review on 24 August 2017 and HMRC wrote to him on 29 September 2017. HMRC maintained its position.
8. On 26 June 2018, HMRC notified the Commissioner and the complainant that in addition to its reliance on section 44(1)(a), it sought to rely also on section 31(1)(d).

Scope of the case

9. Upon receipt of the complaint, the scope of the investigation was discussed with the complainant. It appeared that the request, at part three, sought information which would only be available after the deadline of 10 August 2017 had passed. The request was dated 27 July 2017.
10. As any request is valid in relation to information held at the time of the request, information requested which relates to a future date does not generally constitute a valid request for information.
11. Following a discussion with the complainant, he agreed that he was content that this part of the request was excluded from the scope of the investigation.

12. However, HMRC subsequently set out that its interpretation of the request was that the future date had been added as an example only and HMRC had considered the request to be for the total value of tax and NI for Conditional Share Dividend Bonus arrangements collected by HMRC as at the date the request was made but following any deadline date for responding to a notice. In other words the figure related to all cases where a notice had been issued and the deadline for response had passed.
13. HMRC also set out that it had responded to the request as one request and not as three separate elements.
14. The Commissioner accepts HMRC's interpretation of part 3 of the request. She has considered whether HMRC was entitled to rely on the exemptions at sections 44(1)(a) and 31(1)(d) FOIA. The complainant was advised of the revised scope of the request.

Background

15. The request seeks information with reference to tax avoidance arrangements known as 'Conditional Share Dividend Bonus arrangements'. Essentially the arrangements seek to avoid income tax and National Insurance Contributions (NICs) on the payment of bonuses to employees.
16. The request refers to FNs and APNs; these are Follower Notices (FNs) and Accelerated Payment Notices (APNs). These notices are issued following litigation in cases which used tax avoidance arrangements.
17. HMRC issues FNs to those it believes have participated in tax avoidance arrangements after court rulings in similar cases have found in HMRC's favour. The FNs tell the 'follower' that they will be liable to pay a penalty if they do not settle their dispute with HMRC by amending their return or claim, or settling their appeal.
18. Where someone believes the FN has been incorrectly issued it is open to them to make representations to HMRC. In the absence of representations, the case can be settled in line with the original case or the case can be litigated separately. If the individual chooses the option of litigation and loses, a penalty becomes payable.
19. In these types of cases, many 'followers' agree to settle following the court or tribunal decision in the original case but not all 'followers' do.

20. Having issued FNs, HMRC then issues APNs which request payment upfront of the disputed tax pending a resolution to the dispute. APNs are a 'payment on account' and when paid, HMRC retains that amount until the resolution of the dispute. If the individual is successful, the amount paid following the issue of the APN is repaid with interest and if HMRC is successful, the amount held 'on account' is allocated against the final tax liability.

Reasons for decision

21. Section 1(1)(a) of the 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'.

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)."

22. HMRC has confirmed in its response and review that in this case it holds information within the scope of the request but is prohibited from disclosing it by virtue of the Commissioners for Revenue and Customs Act 2005 (CRCA).

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".

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...."

Section 19 states:

(1) A person commits an offence if he contravenes section 18(1) or 2(a) by disclosing revenue and customs information relating to a person whose identity—

(a) is specified in the disclosure, or

(b) can be deduced from it.

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.....”

23. 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?
24. HMRC’s position in this case is that the answer to both these questions is yes and accordingly, section 18(1) CRCA applies.
25. Section 23 CRCA was amended 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.
26. HMRC has set out 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.
27. The Commissioner considers that her analysis of HMRC’s application of section 44(1)(a) would reveal exempt information and accordingly she has set out her analysis in a confidential annex which will be provided exclusively to the public authority.
28. Having considered HMRC’s submission, the Commissioner considers that section 44(1)(a) is not engaged in relation to parts one and two of the request. The Commissioner will go on to consider whether HMRC has correctly relied on s31(1)(d) and for completeness will consider this in relation to the entire request.

Section 31(1)(d) of the FOIA states that:

29. Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would or would be likely to prejudice the assessment or collection of any tax or duty or of any imposition of a similar nature
30. Section 31 is a prejudice based exemption which means that the information can only be withheld if its disclosure would, or would be likely, to prejudice one of the activities listed in section 31(1) or (2). In this case, the relevant sub-section is 31(1)(d), the assessment or collection of tax.
31. Interpretation of the phrase 'would, or would be likely to' has been considered by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
32. With regard to likely to prejudice, which is the position here, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
33. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
34. With regard to the exemption itself, the following criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, the assessment and collection of tax;
 - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure

'would' result in prejudice

35. HMRC has set out that disclosure of the withheld information would be likely to prejudice the assessment and collection of tax because it could lead to an increase in legal challenges in relation to conditional share bonus cases which would ultimately reduce the amount of revenue available to the public purse.
36. It is HMRC's position that its previous experience of requests on this subject have shown the intention of applicants to gain insight on the actions of other scheme users and to influence their own behaviour in terms of whether to litigate or not.
37. Upon receipt of the FN, the 'follower' can either pay the tax that is due or make representations to HMRC.
38. HMRC can issue an FN provided that four criteria are met and these are set out in the guidance document titled Follower notices and accelerated payments¹.
39. Following the issue of the FN, a 'follower' may make representations on the basis that one or more of three circumstances apply:
 - In relation to the Follower notices and accelerated payments guidance, condition A, B or D of section 1.3 was not met.
 - HMRC's opinion under condition C is incorrect. In other words, the judicial ruling is not one which is relevant to the 'Follower's' arrangements
 - The notice was not issued within the time limit
40. It is therefore open to an individual to litigate their own case.
41. HMRC has asserted that disclosing the actions of other users of a particular arrangement provides an insight into the overall confidence of that arrangement's users to not pay the tax owed.
42. It is the Commissioner's position that whilst the insight into other users behaviour might be of interest to a 'follower' it will remain the case that one or more of three circumstances must apply in order to make representations. It is also the case that unsuccessful litigation on the part of a 'follower' will incur a penalty.
43. The Commissioner considers the argument that disclosure would provide an insight into the users' confidence in the arrangement would be

¹ [Follower notices and accelerated payments - GOV.UK](#)

pertinent if it were the case that the request was for the number of users of the arrangement rather than the sum of tax and NICs owing or paid.

44. Disclosure of the amounts would not equate to disclosure of the number of users of the arrangement. Therefore, in terms of deciding whether or not to make representations, the only information this disclosure would reveal is the amount of money paid where no representations have been made, the value of tax and NICs pending, following representations and the amount of tax and NICs collected following HMRC's refusal to accept the representations and withdraw the notices.
45. Whilst these figures allow for a percentage comparison of the total amount of relevant monies at the date of the request, they do not tell a requester how many persons have made representations. In other words, if the percentage of tax uncollected was 99.5% of the total amount, this could potentially relate to one person and would not necessarily mean that many users of the scheme have had the confidence to challenge to the scheme.
46. The Commissioner also considers that even if the figures were disclosed, in addition to not knowing the relevant amount of 'followers', there would be no information disclosed to suggest why the litigation had been pursued, i.e. the criteria relied on.
47. It is HMRC's position that users of the arrangement would look at the comparison and could determine from the percentage of tax actually paid (or not paid) at the time of the request, whether it is worthwhile making representations or whether it should pay the tax and NICs owing.
48. HMRC has set out that knowing that percentage figure could lead to a 'pack mentality' approach to litigation. In other words, if the majority of tax and NICs due as a result of the arrangement remained uncollected those issued with FNs would simply decide to 'follow suit' and make representations without paying the tax due at that stage.
49. The Commissioner does not agree with HMRC's position regarding pack mentality for the reasons she has set out, that the figure does not disclose the number of persons involved in the scheme and that it is entirely relevant to any individual considering litigation that if unsuccessful, a penalty will be payable to HMRC. The amount of that penalty would vary from user to user. She considers it highly unlikely that individuals would seek to litigate their own case simply because others are entering into litigation where there is no knowledge of how many others or the reasons for that litigation.

50. It is HMRC's position that any further litigation, following the issue of FNs, which may have little basis but would increase costs, would mean that the final amount available to the public purse would be significantly reduced. It is therefore HMRC's position that section 31 is engaged as disclosure of the requested information would be likely to prejudice the assessment and collection of tax.
51. The Commissioner has considered HMRC's position in relation to the exemption at section 31(1)(d).
52. The Commissioner has considered whether disclosure of the requested information would be likely to prejudice the collection of the tax and NICs owing under this particular arrangement
53. The Commissioner's guidance on section 31(1)(d) sets out that the exemption will protect information if its disclosure would prejudice the collection of tax from a particular person or be of use to those evading tax. In line with that guidance she has also considered whether there is a real and significant risk that disclosure of the information would promote tax avoidance in which case the exemption would apply.
54. HMRC's position is that section 31(1)(d) is engaged on the basis that disclosure of the requested information is likely to lead to an increase in litigation and that the related costs for HMRC would mean that the amount of money available to the public purse would be reduced.
55. It is clear that even if disclosure of the requested information did increase the numbers entering into litigation, it does not follow that this would be likely to prejudice either the assessment or collection of tax as the amount owing has been assessed and following any unsuccessful litigation it will be the tax amount outstanding that will be collected.
56. This case relates to tax avoidance which has already been subject to litigation and where the option of litigation is available to any user of the arrangement provided certain circumstances prevail. The Commissioner is not persuaded that disclosure of values requested would present a real and significant risk to HMRC's ability to collect any tax liabilities owed under Conditional Share Dividend Bonus arrangements even if the number of litigants were to increase.
57. In all of the circumstances, the Commissioner does not consider that section 31(1)(d) is engaged in this case. She has not gone on to consider the balance of the public interest in view of her decision that the exemption is not engaged.

Right of appeal

58. 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

59. 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.

60. 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

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