

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2019

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant requested a copy of all responses submitted to the public authority further to a consultation on how to tackle non-compliance with the off-payroll working rules (known as IR35) in the private sector. The public authority withheld the information it held within the scope of the request relying on the exemptions at sections 35(1)(a), 40(2) and 43(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 35(1)(a) FOIA.
3. No steps are required.

Background

4. The background to the request helpfully provided by the public authority is summarised below.
5. In 2000 the government introduced the off-payroll working rules known as IR35. These rules ensure that people working through a personal service company (PSC) who would have been employees if they had been engaged directly pay broadly the same Income Tax and National Insurance contributions (NICs) as if they were employed. It is estimated that only 10% of individuals working in this way apply the rules properly costing the Exchequer hundreds of millions of pounds in lost tax revenues every year.
6. In April 2017 the government reformed these rules for engagements in the public sector and early indications are that this has resulted in an increase in public sector compliance.
7. In the Autumn Budget 2017 the government announced it would consult on how to tackle non-compliance with the off-payroll working rules in the private sector. The consultation to which this request relates asked for comments on the best way to do this. The consultation closed on 10 August 2018.
8. In response to this consultation, at Budget 2018 the government announced that it intends to extend the reforms to the off-payroll rules. A further consultation on the detailed operation of the new rules was published on 5 March 2019 and will remain open until 28 May 2019. This consultation seeks views on the implementation of the April 2020 reform of the off-payroll working rules. Consultation responses from both summer 2018 and the current consultation will inform detailed policy design and the draft Finance Bill legislation which is expected to be published in summer 2019. The new rules will be given effect from 6 April 2020.

Request and response

9. On 17 September 2018 the complainant submitted a request to the public authority in the following terms:

"As requested in your attached letter I can clarify that in accordance with the FOI Act I have requested "a copy of all consultation responses submitted to the HM Treasury with regards to IR35 Income Tax Off Payroll Review.""¹
10. The public authority provided its response on 9 October 2018. It confirmed that it held some information within the scope of the request which it considered exempt on the basis of section 35(1)(a) FOIA.
11. On 16 October 2018 the complainant requested an internal review of that response.
12. The public authority wrote back to the complainant on 14 December 2018 with details of the outcome of the internal review. The review upheld the original decision to rely on the exemption at section 35(1)(a) FOIA.

Scope of the case

13. The complainant initially contacted the Commissioner on 23 November 2018 to complain about the way his request for information had been handled. However, the complaint was not accepted for investigation until the public authority had completed its internal review on 14 December 2018. The Commissioner has referred to the complainant's submission at the relevant part of her analysis below.
14. During the course of the investigation the public authority sought to also rely on the exemptions at sections 21 (information accessible to applicant by other means), 40(2) (personal data)² and 43(2) (prejudice to commercial interests)³ FOIA. The complainant was subsequently

¹ The public authority clarified that this was a follow up to a request that the complainant had submitted on 20 August 2018 concerning the consultation. On that occasion the request was unclear and the complainant was asked to clarify the terms of his request.

² Applied to the names and contact details of individuals who sent the withheld consultation responses on behalf of their companies.

³ Applied to a small amount of information in one of the withheld consultation responses.

provided web links to the published information considered exempt under section 21 FOIA and has consequently not challenged the application of that exemption.

15. The scope of the investigation therefore was to consider whether the public authority was entitled to rely on the exemptions at sections 35(1)(a) and 43(2) FOIA as the basis for withholding the information held within the scope of the request (the withheld information).

Reasons for decision

Withheld information

16. The information in scope comprises of the responses of 10 companies to the summer 2018 consultation seeking views on the best way to tackle non-compliance with the off-payroll working rules known as IR35 in the private sector.
17. The withheld information comprises of the responses of 5 companies to the summer 2018 consultation.
18. The remaining 5 responses were published by the companies themselves. This is the information that the public authority has withheld on the basis of the exemption at section 21. As mentioned, the public authority has supplied the links to the published responses to the complainant.

Section 35(1)(a)

19. The public authority considers all of the withheld information exempt on the basis of section 35(1)(a).
20. Section 35(1)(a) states:

“Information held by a government department is exempt information if it relates to the formulation or development of government policy.”⁴

The public authority's position

21. The public authority's submission is summarised below.
-

⁴ Full text of section 35 FOIA - <http://www.legislation.gov.uk/ukpga/2000/36/section/35>

22. The withheld information relates to the formulation and development of live and current government policy. At Chapter 8 of the original consultation document (page 31)⁵, it was explained that the consultation exercise was the first stage of the policy development process.

23. The relevant explanation states:

“This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

Stage 1 Setting out objectives and identifying options.

Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.

Stage 3 Drafting legislation to effect the proposed change.

Stage 4 Implementing and monitoring the change.

Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 1 of the process. The purpose of the consultation is to seek views on the policy design and any suitable possible alternatives, before consulting later on a specific proposal for reform.”

24. The consultation closed on 10 August 2018. At the time the request was submitted on 17 September 2018 the government was still considering the responses received and putting together its own response. There was therefore a need to maintain a safe space for that to happen.

25. The government response document⁶ which included a summary of the consultation responses received and a list of all the organisations which had responded was published on 29 October 2018. This included the following statement on Next Steps at section 3.1:

“The government announced at Budget 2018 that it intends to extend the reforms to the off-payroll rules. A further consultation on the

5

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708544/Off-payroll_working_in_the_private_sector_-_consultation_document.pdf

6

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752160/Off-payroll_working_in_the_private_sector_-_summary_of_responses.pdf

detailed operation of the new rules will be published in the coming months. This consultation will inform the draft Finance Bill legislation, which is expected to be published in Summer 2019. The new rules will be given effect from 6 April 2020.”

26. Reform to the off-payroll working rules therefore remains an area of live policy development because decisions still need to be taken and legislation brought forward to which the consultation responses (ie the withheld information) relate. The consultation responses provide important evidence on the policy design and implementation of the reform.
27. The withheld information clearly relates to the ongoing formulation of government policy and as such engages the exemption at section 35(1)(a).
28. With respect to the balance of the public interest, the public authority acknowledged that there is an inherent public interest in transparency and accountability of public authorities. There is a broad public interest in furthering public understanding of the issues with which public authorities deal. There is also a clear public interest in the work of government departments being transparent and open to scrutiny to increase diligence. The publication of the summary of responses however goes some way to meeting the public interest in disclosure in this case.
29. In favour of maintaining the exemption, there is a public interest in protecting the government’s ability to discuss and develop policies and to reach well-informed conclusions. At the time the request for information and the request for an internal review were received, the government was still collating the response it had received and considering its response to the consultation.
30. Furthermore, the policy work is ongoing as evidenced by the current consultation and the legislation brought forward. The withheld information relates directly to this work.
31. There is therefore a very weighty public interest in preserving and protecting the safe space required to discuss and develop good policy and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies.
32. In addition, disclosing the withheld information could result in a chilling effect on the ongoing related consultation. It is expected that many of the companies who responded to the first consultation will also respond to the ongoing consultation.

33. On balance therefore the public interest in maintaining the exemption clearly outweighs the public interest in disclosing the withheld information.

The complainant's position

34. The complainant's submission is reproduced below.
35. "It is in the public interest that the off Payroll Consultation documents should be available to the public especially as the consultation ended in August 2018 and no Off Payroll Policy has been implemented."
36. "It is also pertinent to note that there has been a £13 Billion increase in tax revenue since the 2017 announcement that the Government were going to finally monitor the Private Sector multi £Billion Off Payroll System."
37. In response, the public authority reiterated that the policy formulation process is still ongoing with a further consultation currently ongoing and legislation planned.
38. Furthermore, the figure of £13 billion is not one that the government recognises in relation to off-payroll working. Evidence suggests that compliance has improved since the off-payroll working reform was introduced in the public sector in 2017. HMRC estimates the reform has raised £550 million in Income Tax and NICs in its first year.

The Commissioner's considerations

Is the exemption engaged?

39. The Commissioner has first considered whether the exemption at section 35(1)(a) is engaged.
40. The exemptions at section 35 are class based. This means that as opposed to prejudice-based exemptions, demonstrable evidence of the likelihood of prejudice is not a condition for engaging the exemptions. The withheld information simply has to fall within the class described, in this case, the formulation or development of government policy. The classes are broad and will capture a wide range of information.
41. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly within the meaning of the class exemption. This means that the withheld information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.

42. The Commissioner considers that the withheld information relates to the formulation or development of government policy on tackling non-compliance with the off-payroll working rules in the private sector.
43. The exemption at section 35(1)(a) was therefore correctly engaged because the withheld information falls within the class of information that the exemption is designed to protect.

Balance of the public interest

44. As mentioned, the exemption is subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
45. In addition to the general public interest in transparency and accountability of public bodies, the Commissioner considers that there is a public interest in disclosing the consultation responses of these important stakeholders on an issue of significant public interest. According to the public authority, the cost of non-compliance with the off-payroll working rules in the private sector will reach £1.3 billion a year by 2023/24. The public will be able to form their own views on how these stakeholders view the government's approach to tackling the issue. The public will also have a more informed view on the extent to which the views of these stakeholders have been taken into account in the draft Finance Bill due for summer 2019.
46. The Commissioner accepts that there is a strong public interest in preventing a chilling effect on responses to the current consultation. Disclosing the withheld information is likely to have an inhibiting effect on free and frank responses to the current consultation from those who are likely to be affected the most by a reform of the off-payroll working rules in the private sector. In order to be able to tackle the issue in a robust manner, all stakeholders need to be able to share their views with the government as freely and frankly as possible. While it is the case that some of the companies published their response to the summer 2018 consultation, not all of them did.
47. The companies that did not publish their response to that consultation are less likely to be as candid as they otherwise might be in their response to the current consultation and in other discussions with government on tackling the issue if the withheld information is published while the matter is still live. The Commissioner notes that the current consultation period ends on 28 May 2019. However, she considers that the chilling effect is likely to extend to related future discussions with stakeholders on the issue while it is still live.

48. The Commissioners does not accept that there was a strong public interest in maintaining a safe space further to responding to the summer 2018 consultation (ie not the current consultation) in view of the timing of the request. Although at the time the request was submitted the government was still collating the consultation responses and considering its own response, that was no longer the case at the time the internal review was concluded on 14 December 2018. Reflecting the position taken by the Upper Tribunal in *APPGER v ICO and Foreign and Commonwealth Office* (UKUT 0377 (ACC)), the Commissioner considers that the public interest should be assessed by reference to the circumstances at or around the time the request was considered by the public authority including the time of any internal review. The government's response to that consultation was published on 29 October 2018.
49. However, the Commissioner does accept that there is a strong public interest in maintaining a safe space for discussions further to responding to the current consultation and more broadly in the course of the policy formulation and development process that is still ongoing in relation to reforming the off-payroll working rules in the private sector. Disclosing the withheld information is likely to distract from these ongoing deliberations.
50. Taking all of the above into account, the Commissioner finds that on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
51. In view of her decision that the public authority was entitled to rely on the exemption at section 35(1)(a), the Commissioner has not considered the applicability of the exemptions at sections 40(2) and 43(2).

Other Matters

52. The FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the ICO guidance explains that an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
53. The internal review was requested on 16 October 2018 and completed on 14 December 2018, taking the public authority 44 working days in total.
54. The public authority advised the complainant on 22 November 2018 that it would aim to provide a respond within 40 working days because in its view the internal review in this case was more complex and might require consultation with third parties. However, that response was subsequently delayed by 4 working days.
55. The Commissioner notes that the public authority consulted with one of the stakeholders further to the application of the exemption at section 43(2) for the first time during the course of her investigation. It is not clear whether the public authority consulted with any third parties further to the application of section 35(1)(a), the only exemption it relied on at the time of the request.
56. The Commissioner accepts that in some cases it might take longer than 20 working days to complete internal reviews. In her view the majority of internal reviews should not take longer than 40 working days. It is regrettable that it took the public authority 44 working days to complete the internal review in this case. The public authority has explained to the Commissioner that the delay in completing the internal review is linked to the fact that it lost 3 staff in its Information Rights Unit in close proximity and at very short notice and had to embark on a recruitment exercise which took some time. However, the team is now fully resourced and working hard to deal with the backlog of internal reviews.

Right of appeal

57. 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

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

58. 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.
59. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF