

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 March 2020

**Public Authority:** HM Revenue & Customs  
**Address:** 100 Parliament St  
London  
SW1A 2BQ

#### Decision (including any steps ordered)

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1. The complainant has requested information about how HM Revenue & Customs ("HMRC") dealt with individuals involved with a particular tax avoidance scheme ("the Scheme"). HMRC refused to confirm or deny holding information as it claimed that to do so would breach the Commissioners for Revenue and Customs Act 2005 (CRCA) and therefore it was entitled to rely on section 44(2) of the FOIA.
2. The Commissioner's decision is that HMRC is entitled to rely on section 44(2) of the FOIA to neither confirm nor deny holding information.
3. The Commissioner does not require any further steps.

#### Request and response

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4. On 8 September 2019, the complainant wrote to HMRC and requested information in the following terms:

*"My request is to be advised of the exact number of corrective action extensions given in the IOM tax avoidance case HMRC refer to as [the Scheme]."*

5. HMRC responded on 24 September 2019. It refused to confirm or deny holding information within the scope of the request. It believed that confirming that information was (or was not) held would, in itself, provide information about an identifiable "person" which HMRC held in connection with one of its functions. As there was a statutory prohibition on disclosure of information of this type, it was able to rely on section 44(2) of the FOIA to neither confirm nor deny holding information.

6. Following an internal review HMRC wrote to the complainant on 1 November 2019. It upheld its original position although it provided further information about why it was relying on the exemption.

## Scope of the case

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7. The complainant contacted the Commissioner on 4 December 2019 to complain about the way his request for information had been handled. He argued that release of this information would be in the public interest and that it was unfair that HMRC was able to disclose or to withhold information when it was advantageous to do so.
8. HMRC set out its position clearly in both its initial response and its internal review. Given the Commissioner has a well-established position on the interaction between the CRCA and the FOIA (one which has been upheld by the Tribunal), she considers she has sufficient information to make a decision without requiring further submissions from HMRC.
9. The Commissioner considers that the scope of her investigation is to determine whether issuing a confirmation or a denial that information is held would breach CRCA. If it would, section 44(2) of the FOIA will be engaged.
10. For the avoidance of doubt, the Commissioner has not sought, from HMRC, its true position in respect of any information it may hold. Nothing in this DN should be construed as indicating that HMRC does or does not hold any particular information.

## Reasons for decision

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11. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.*

12. Section 44(1) of the FOIA provides an exemption from disclosure for any information whose disclosure would either be otherwise prohibited by

another piece of legislation or which would constitute a contempt of court.

13. Section 44(2) of the FOIA provides an exemption from the duty to confirm or deny whether information is held if the mere act of confirming or denying alone would involve the disclosure of information which was otherwise prohibited.

14. In its initial response, HMRC noted that:

*"Section 44 of the FOIA applies when the requested information, if held, would be prohibited from disclosure by another piece of legislation.*

*"In this instance, section 18(1) of the CRCA gives HMRC a duty of confidentiality which applies to all information it holds in connection with its functions. The prime examples of a function are the assessment and collection of tax; and the payment and management of tax credits. This is to make sure that information held on people and businesses would be protected and released only in controlled and limited circumstances.*

*"When deciding whether we are prohibited from releasing information under FOIA by our duty of confidentiality, CRCA section 23(1) sets the following two questions:*

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

*"The term "person" includes legal entities such as companies, trusts and charities, as well as living individuals (see Schedule 1 of the Interpretation Act 1978).*

*"In this case, the answers to both questions is "Yes". Our duty of confidentiality therefore applies under CRCA section 18(1) and we are exempt from releasing the information under FOIA section 44(1)(a).*

*"Sometimes even just confirming whether we hold the information could tell you something about this person. So FOIA section 44(2) exempts us from either confirming or denying whether we hold information as it would also breach the duty of confidentiality set out in section 18(1) of the CRCA."*

15. Schedule 1 of the Interpretation Act 1978 defines a "person" in this context thus:

*'Person' includes a body of persons corporate or unincorporate.*

16. The Commissioner has already held that this definition of the word "person" will stretch beyond a "natural" person and will include "legal" persons such as companies, charities and trusts. She has also previously ruled that a scheme itself will be a "person" for the purposes of CRCA.<sup>1</sup>
17. The request itself names the Scheme. In confirming or denying that it held information within the scope of the request, HMRC would be disclosing information about the Scheme – namely that members of the scheme had been subject to corrective action extensions. This information will clearly "relate to" the Scheme and the Scheme will be identifiable from the information – when read with the request.
18. By confirming or denying it held information within the scope of the request, HMRC would be disclosing whether corrective action extensions had been offered in the course of collecting taxes. Any such information would thus clearly relate to a "function" of HMRC: its function in relation to the general management and collection of taxes.
19. The Commissioner is therefore satisfied that HMRC has correctly applied the two-step test set out in section 23(1) of the CRCA. Any information it held within the scope of the request, because of the way it was worded, would relate to HMRC's functions *and* would relate to a "person" who could be identified from that information (when read with the request). The disclosure of such information would thus be prohibited by section 23(1) of the CRCA and therefore section 44 of the FOIA would automatically be engaged.
20. As the mere act of confirming or denying whether information is held would, in itself, disclose such prohibited information, HMRC was entitled to neither confirm nor deny holding information within the scope of the request and has correctly relied on section 44(2) of the FOIA to do so.
21. As section 44 is an absolute exemption, the Commissioner is not required to consider the balance of public interest in providing a confirmation or a denial that information is held.

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<sup>1</sup> See, for example:

<https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2615129/fs50793047.pdf>

## Right of appeal

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22. 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 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

23. 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.
24. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**