

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2021

Public Authority: Her Majesty's Revenue and Customs

Address: 100 Parliament Street

London

SW1A 2BQ

Decision (including any steps ordered)

1. The complainant requested cost information relating to a specific employment tribunal case. HMRC refused to confirm or deny whether the information was held under section 44(2) (statutory prohibition) of the FOIA.
2. The Commissioner's decision is that HMRC was correct to rely on section 44(2) of the FOIA to neither confirm nor deny whether the information was held.
3. The Commissioner does not require HMRC to carry out any steps.

Request and response

4. On 10 February 2020 the complainant made the following information request to the HMRC:

"I'm currently in a tribunal claim against HMRC [Redacted Employment Tribunal case reference]

I would like to know:

-how much money HMRC has spent so far with its representatives defending this case

-how much the 8-day hearing that is planned for later in the year is projected to cost

-what basis is used to judge whether the case is worth defending.

-any other cost information available that I can have with respect to this case. For example, internal costs of dealing with [name redacted] grievances."

5. HMRC responded on 21 February 2020 relying on section 44(2) of the FOIA to neither confirm nor deny holding the information, as it determined that to even confirm or deny whether the information is held would in itself reveal information exempt under section 44(1)(a) of the FOIA – information prohibited from disclosure under any enactment.
6. The complainant requested an internal review on 21 February 2020 disagreeing with the exemption applied.
7. The HMRC provided its internal review on the 11 March 2020 upholding its initial response.

Scope of the case

8. The complainant contacted the Commissioner on 14 May 2020 to complain about the refusal of the request.
9. During the Commissioner's investigation, it asked the HMRC to consider whether section 40(5B) (personal information) was also engaged in relation to this request.
10. The HMRC agreed that this exemption would also be engaged, and the Commissioner advised the complainant of this.

11. The following analysis covers whether section 44(2) of the FOIA was engaged in relation to the complainant's information request. As noted below it was not necessary to also cover section 40(5B) in this notice.

Reasons for decision

Section 44(2) of the FOIA – Neither Confirm nor deny

12. HMRC relied on section 44(2) to neither confirm nor deny holding the requested information as it has determined that to do so would in itself reveal information that is exempt under section 44(1)(a) of the FOIA.

13. Section 44(1)(a) states:

"(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"

14. The exemptions at section 44 are absolute. This means that they are not subject to a public interest test. Once it is determined that any of the exemptions are engaged, a public authority is not required to consider whether there is public interest in confirming or denying whether it holds the requested information or in disclosing the information held.

15. The Commissioner has asked HMRC to explain how it considers revealing whether or not information is held within the scope of the complainant's request fits the requirements of section 44(2) of the FOIA.

16. HMRC has explained that sections 18(1) and 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA) prohibit it from disclosing any information held in connection with its function.

17. 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."

18. Although there are exceptions to section 18(1) contained in sections 18(2) and (3) CRCA, section 23 of the CRCA was amended by section 19(4) of the Borders, Citizenship and Immigration Act 2009 to make clear that sections 18(2) and (3) of the CRCA are to be disregarded

when considering disclosure of revenue and customs information relating to a person under FOIA.

19. Notwithstanding the above, section 23(1) CRCA states:

"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... if its disclosure

(a) Would specify the identity of the person to whom the information relates, or

(b) would enable the identity of such a person to be deduced.

(2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000."

20. Therefore, information prohibited from disclosure by virtue of section 18(1) CRCA (in this case, on the basis that if held, it would be held by the authority in connection with its functions) is exempt information by virtue of section 44(1)(a) of the FOIA only if its disclosure would identify a "person".

21. HMRC has stated to the Commissioner that neither section 18(1) nor section 23 of the CRCA distinguishes between statutory functions explicitly conferred on HMRC or general functions/obligations shared with other public authorities and this distinction is also not made in the FOIA itself.

22. HMRC also raises that section 9 of the CRCA specifies that the department is granted the power to do anything which it thinks is necessary, incidental or conducive to the exercise of its functions and that section 51 confirms that the term "function" means "...any power or duty (including any power or duty that is ancillary to another power or duty)".

23. HMRC therefore views this as the CRCA providing a wide interpretation of the term "functions".

24. On this basis HMRC argues that information relating to *any HMRC function* falls within scope, such as the defence of the department at employment tribunal. It is of the view that if Parliament wanted to limit

section 18(1) of the CRCA to apply to only "core functions", it would have done so.

25. In addition to the above, HMRC states that as the named claimant in the request was an officer of HMRC, this lends further support to its defence in this employment tribunal case being an HMRC specific function.
26. It is clear that confirming or denying whether the information requested by the complainant is held would identify the person named in the request.
27. The Commissioner accepts HMRC's position that the CRCA provides a wide interpretation of the term "functions" and that this covers its defence in the tribunal case to which the request relates. The Commissioner therefore finds that confirming or denying whether the information requested is held by HMRC would reveal information held in connection with its functions and that the wording of the request means that this information would specify the identity of the person to whom it relates.
28. In view of the above, the Commissioner finds that the public authority was entitled to rely on section 44(2) of the FOIA to neither confirm nor deny whether it holds the requested information within the scope of the request.
29. As the Commissioner has found the HMRC can rely on section 44(2) FOIA to neither confirm nor deny holding the information, she has not gone on to consider section 40(5B) of the FOIA.

Right of appeal

12. 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

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

13. 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.
14. 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

Ben Tomes
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