

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 August 2021

**Public Authority:** HM Revenue and Customs

**Address:** 6 Floor  
Central Mail Unit  
Newcastle Upon Tyne  
NE98 1ZZ

#### Decision (including any steps ordered)

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1. The complainant requested from HM Revenue and Customs ("HMRC") information relating to the Coronavirus Job Retention Scheme ("CJRS"). HMRC refused to disclose some of the information and cited section 31(1)(a) (prejudice to the prevention or detection of crime) of the FOIA.
2. The Commissioner's decision is that HMRC correctly applied the exemption to the information relating to questions 2, 4 and 6 of the request. Therefore, the Commissioner does not require HMRC to take any steps as a result of this decision.

#### Background

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3. The Commissioner understands from HMRC's explanation, that "*CJRS is part of the collective national effort to protect jobs. Fraudulent claims limit our ability to support people and deprive public services of essential funding.*" HMRC further explained that its Chief Executive Officer and Permanent Secretary – Jim Harra, provided the Public Accounts Committee with an update on this scheme and associated compliance activity on 10 June 2020.
4. HMRC also said that it had emphasised to the complainant that the CJRS will still be operating until the end of October 2020.

## Request and response

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5. On 9 June 2020 the complainant wrote to HMRC and requested information in the following terms:

*"Since the introduction of the CJRS to date 1st June 2020:*

- 1. How many companies have claimed support through CJRS across the UK?*
- 2. How many companies receiving support through CJRS have been, or are currently being, investigated for fraud?*
- 3. How did the Government first discover/determine grounds for investigating those it has investigated, or is currently investigating, for fraud?*
- 4. What are the UK geographical splits involving those companies who have been or are being investigated for COVID-19 fraud?*
- 5. What different acts of criminality have hitherto been detected by companies suspected of abusing/deemed to have abused CJRS? Do these vary from region to region in the UK?*
- 6. How much money has hitherto been recovered from companies making criminal applications for support under CJRS - and how many companies has this involved?*
- 7. From the data gathered to date, what proportion of payments made by Government are believed to be ineligible or fraudulent? What is this value in £?*
- 8. What percentage of money paid out as either ineligible or fraudulent does Government think that it will be able to recover? And how long and how much money will it cost it to recover funds inappropriately already paid out?*
- 9. What pre-financing checks did the Treasury/HMRC conduct to prevent payments being made to ineligible or fraudulent applicants?*
- 10. What pre-financing checks did the Treasury/HMRC conduct to ascertain the accuracy and legitimacy of claims for support made by companies under CJRS?*
- 11. How many staff are involved in due diligence, checking to ensure that, prior to payment, CJRS applications are legitimate and qualifying?*
- 12. How many staff are involved in due diligence, recovering money already paid to ineligible CJRS applicants or to CJRS applicants who have made fraudulent applications?"*

6. On 7 July 2020 HMRC responded and informed the complainant that the information for question 1 is already published and available on the website GOV.UK. With regard to questions 2 to 12, HMRC considered this information exempt from disclosure under section 31(1)(a) (prejudice the prevention or detection of crime) of the FOIA, and said that if released, "*would or would likely prejudice the prevention or detection of crime.*"
7. On the same day the complainant asked HMRC for an internal review.
8. On 8 July 2020 HMRC acknowledged receipt of the internal review request.
9. On 17 March 2021 following a number of chasing emails from the complainant to HMRC asking for its internal review response to his request, HMRC provided its outcome. It stated to the complainant that information to his questions 3, 5, 7 to 12 can be found within the National Audit Office Report.<sup>1</sup> With regard to the remaining questions of the request - 2, 4 and 6, HMRC still considered this information exempt from disclosure under section 31(1)(a) of the FOIA.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 12 October 2020 to complain about the way his request for information had been handled. Specifically, he disputes HMRC's refusal of information and its reliance of the exemption. The complainant also expressed his dissatisfaction with HMRC's handling of his request for an internal review.
11. The following analysis focuses on whether the exemption at section 31(1)(a) of the FOIA was cited correctly to questions 2, 4 and 6 of the request. The Commissioner has commented on the handling of the internal review in the "Other matters" section at the end of this notice.

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<sup>1</sup> <https://www.nao.org.uk/report/implementing-employment-support-schemes-in-response-to-the-covid-19-pandemic/>

## Reasons for decision

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### Section 31(1)(a) – (prejudice to the prevention or detection of crime)

12. Section 31(1)(a) of FOIA states that:

*"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-*

*(a) the prevention or detection of crime"*

13. In order for a prejudice based exemption, such as section 31(1)(a), to be engaged there must be likelihood that disclosure would cause prejudice to the interest that the exemption is designed to protect. The Commissioner considers that three criteria must be met:

- Firstly, 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;
- Secondly, 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
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. whether disclosure "would be likely" to result in prejudice or disclosure "would" result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

14. Consideration of section 31(1)(a) of the FOIA is a two-stage process; even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

## HMRC's position

15. HMRC confirmed to the Commissioner that the request consists of 12 questions, these related to the compliance action taken by HMRC in response to fraudulent use of the CJRS. It informed her that although it had initially refused the information in its entirety, after conducting its internal review, the majority of the information had featured in a National Audit Office (NAO) publication. HMRC maintained that information held within scope of questions 2,4 and 6 was exempt from disclosure by virtue of section 31(1)(a) of the FOIA.
16. HMRC explained to the Commissioner that consideration must be given to the subject of the request in its full context in order for the level of prejudice to be assessed. HMRC stated the following:

*"On 11 March 2020, the World Health Organisation declared COVID-19 a pandemic; the biggest global threat for decades. The government was presented with an unparalleled challenge in responding to what was first and foremost a health crisis.*

*On 16 March, the Prime Minister announced that individuals should work from home "where they possibly can" to reduce "non-essential contact" and "unnecessary travel" and one week later, on 23 March, the government enforced a full UK lockdown. This required a huge national effort to reduce the spread of the virus, minimising the increased demand on the NHS from COVID-19 and, essentially, helping the UK save more lives. The government determined that implementing and enforcing the COVID-19 restrictions was necessary to save lives and protect the NHS but, unavoidably, the restrictions would also have a detrimental economic impact.*

*Measures were necessary to minimise this impact where possible. On 20 March, ahead of the UK lockdown, the Chancellor announced the Coronavirus Job Retention Scheme (CJRS). This scheme was part of a wider package of support for businesses and individuals. The CJRS aimed to allow businesses to preserve the employer-employee relationship, follow government guidelines and, where necessary, ask employees to stop working in order to help reduce the spread of infection by encouraging employees to stay at home.*

*These measures were devised and implemented at pace from a standing start. This was to the credit of policymakers and operational staff, who were working harder than ever, to get fiscal support to those who need it most and to protect the economy and businesses and preserve jobs.*

*HMRC's aim is to strike the right balance between getting money to those who need it and preventing abuse."*

17. HMRC said that it is relying on a number of measures to prevent and identify fraudulent claims, and it provided the Commissioner with a list of these measures.
18. HMRC stated that disclosure of information to question 2 of the complainant's request, in conjunction with its regular CJRS statistics *"would be tantamount to disclosing the department's operational awareness of such fraud as well as the compliance resource dedicated to countering it at a time when it was known to the public that the department's compliance capability was reduced."* HMRC said it considered that to disclose the number of investigations (question 2) would allow those so minded to more effectively estimate how successful HMRC is in locating such activities and in pursuing prosecutions.
19. This, HMRC said, *"would be a valuable aid to those individuals in deciding how likely it is or is not that they will be apprehended, and this may in turn lead to more unlawful activity."*
20. HMRC argued that the prejudice is heightened given the timing of the request. It explained that Finance Act 2020 provided substantial enforcement powers to HMRC relating to the CJRS, however, it did not receive Royal Assent until 22 July 2020. Therefore, the enforcement powers under which investigations could be instigated, did not exist, even though HMRC may have been reviewing a large number of cases prior to this date. HMRC said that it would have provided a misleading view of its compliance capabilities, if the information (number of investigations) was disclosed, and that this would drive further fraudulent activity.
21. HMRC stated that disclosure of the requested information, would in turn make it more difficult for the department to withhold future requests on what is an ongoing issue.
22. With regard to the withheld information which the Commissioner had requested to have sight of to assist in her determination of this case, HMRC said that the information had not been maintained as it was in June 2020. It explained that it holds current records of the information, and determined that to recreate the previous information would pose an unreasonable burden which would exceed the FOIA cost limit.
23. However, HMRC was asked again by the Commissioner to have sight of the information. Subsequently, HMRC provided the Commissioner with a copy of the withheld information which it confirmed was available at the time of the request.

*The applicable interest*

24. The first criterion in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the prevention or detection of crime.
25. In its submission to the Commissioner, HMRC said that release of the requested information could encourage criminal activity. It explained that it would allow opportunistic individuals and fraudsters to identify where HMRC are allocating resources, and that this information could be used to judge the possibility of challenge from HMRC and allow these individuals to arrange their activities accordingly.
26. The Commissioner is satisfied that the prejudice HMRC is envisaging in this case, is relevant to the particular interests which section 31(1)(a) is designed to protect. Accordingly, the first criterion of the three part test outlined above is met.

*The nature of the prejudice*

27. The Commissioner considered whether HMRC demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(a) of the FOIA is designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, i.e. have a damaging or detrimental effect on it.
28. With regard to the second criterion, having viewed the withheld information and considered the context of this case and in conjunction with HMRC's arguments, the Commissioner is satisfied that the information relates to details of the CJRS. If disclosed, this could promote criminal activity such as fraud. This could have a detrimental effect on the prevention or detection of crime.
29. The Commissioner is satisfied that the resultant prejudice can be correctly categorised as real and of substance. Furthermore, she is also satisfied that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.

*Likelihood of prejudice*

30. With regard to the third criterion, HMRC confirmed to the Commissioner that disclosure of the requested information "*would be likely*" to prejudice the prevention or detection of crime.

31. HMRC said *"it is considered that to disclose the number of investigations would allow those so minded to more effectively estimate how successful HMRC is in locating such activities and in pursuing prosecutions. This would be a valuable aid to those individuals in deciding how likely it is or is not that they will be apprehended, and this may in turn lead to more unlawful activity."*
32. In order for the Commissioner to accept that disclosure would be likely to result, there must be a real and significant likelihood of this prejudice occurring, rather than this outcome being of remote likelihood.

*Is the exemption engaged?*

33. In a case such as this, it is not sufficient for the information to relate to an interest protected by section 31(1)(a) of the FOIA. Its disclosure must also be at least likely to prejudice that interest. The onus is on the public authority to explain how that prejudice would arise and why it would be likely to occur.
34. The Commissioner accepts HMRC's arguments that releasing the information would be likely to incite criminal behaviour. The information would allow individuals to identify where HMRC are assigning resources and use this to arrange fraudulent activities accordingly.
35. The Commissioner recognises that the chance of prejudice occurring is more than a hypothetical possibility; there is a real and significant risk that disclosure of the information in question could result in the outcomes predicted by HMRC.
36. The Commissioner is satisfied that disclosure of the information would be likely to represent a real and significant risk of prejudice to the prevention or detection of crime. She considers that the exposure of how HMRC is tackling fraudulent claims under the COVID scheme, would allow opportunists to identify where HMRC are applying resources. This could then be used to judge the possibility of challenge from HMRC, and allow those intent to fraud to arrange their activities accordingly.
37. As she accepts that the outcome of disclosure predicted by HMRC would be likely to occur, the Commissioner is therefore satisfied that section 31(1)(a) of the FOIA is engaged.

### **Public interest test**

38. Section 31(1)(a) of the FOIA is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 31(1)(a) outweighs the public interest in disclosing the information.



*Public interest arguments in favour of disclosure*

39. HMRC recognises that there is a general public interest in promoting transparency, accountability and public understanding about public authorities. HMRC also acknowledges that there is strong public interest in ensuring that it is transparent about its activities. It accepts that there may be public interest in knowing how HMRC is tackling fraudulent claims under the CJRS. Releasing this information, HMRC said, would reassure the public that its compliance activities are fair and robust and applied equitably.
40. The complainant argued that there is a public interest in releasing the information in respect of a requirement of public awareness of fraud risk, and susceptibility with regard to COVID related frauds. He believes that the public need to know what frauds are being committed, and what fraud schemes are active at this time.
41. The Commissioner notes that the complainant has a degree of experience and qualification of fraud specialism. Therefore, he has a professional interest in knowing this information. His view is that fraud specialists can help people, also enterprises and charities can properly assess the changing fraud landscape. The complainant believes that fraud specialists can help the public *"to counter threats when they are being unwittingly used to defraud The Exchequer via coronavirus-related support or equipment procurement programmes."* He also said that he needs this information to know how to help people reduce fraud risks. The complainant further argued that HMRC does not have *"a monopoly on enforcement"* and that it is not providing *"education or guidance to fraud specialists."* He stated that in order to prevent fraud, *"there first has to be knowledge sharing among those able to advise and assist victims."*
42. Within his argument to HMRC, the complainant referred to a COVID-19 Fraud Response Team operated by the Cabinet Office which assists the government with its counter fraud response. To provide context to his request, the complainant drew attention to a statement by Grant Shapps MP at a press conference; *"around the edges there may be people trying to abuse it and that would be a criminal offence"*. The complainant therefore believes that Mr Shapps has access to and has full knowledge of the level and breadth of fraud involving the CJRS, although, the complainant said, the fraud statistics were not revealed at that press conference.
43. The complainant said that most of the information relating to his request is in the public domain, and he disputed that the remaining information should be withheld. He is of the view that there is no justification to do so and that HMRC is *"wrong to attempt to conceal this basic data."*

44. The complainant strongly believes that refusal to disclose the information is based on what he considers "*grounds to conceal serial mismanagement of billions of pounds of Treasury funds*" which in his view, is very much in the public interest.

*Public interest arguments in favour of maintaining the exemption*

45. HMRC stated to the Commissioner the total amount that was claimed at the end of June 2020 under the CJRS representing support to 9 million employments. HMRC explained that when dealing with such large sums, any information which could aid fraudulent activity would result in a massive impact on public finances. Specifically, at a time when public borrowing is at the highest nominal level since 1947 (modern records began). Therefore, HMRC argued that disclosure of the requested information could result in any such prejudice which it considers not in the public interest. HMRC said that any details that puts its compliance activities at risk, could undermine public confidence in the tax system. HMRC argued that "*this could damage the general climate of honesty among the overwhelming majority of taxpayers who use the system properly.*"
46. HMRC stated that the CJRS has helped 1 million employers across the UK (correspondence of 20 July 2020), furloughed almost 9 million jobs. It reiterated that anything which could undermine this scheme and impact on the support the government offers, is not considered in the public interest. HMRC also finds that the public interest in transparency of its compliance activities with regards to "*furlough fraud*" is met by the level of information already available.
47. HMRC considers that in his appearance at Public Accounts Committees, Mr Harra – HMRC's Chief Executive, had been transparent about the number of investigations HMRC intend to open, and also of the action it has taken to encourage compliance. HMRC said that this level of transparency is appropriate and does not prejudice its work into addressing serious fraud. It believes that this transparency and accountability is met by ongoing work with NAO and publications on the website GOV.UK.

*Balance of the public interest arguments*

48. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the withheld information and the arguments of both the complainant and HMRC.
49. The Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime against the public interest in openness and transparency. She notes that there is a presumption within the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
50. The Commissioner considers that it is important that the general public has confidence in HMRC with its compliance action in response to fraudulent use of the CJRS and in tackling fraudulent claims under the CJRS. There is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust. In this case, the withheld information would reveal figures relating to companies receiving support through the CJRS and investigated for fraud. Also, information regarding the UK geographic splits involving those companies, and details relating to companies making fraudulent applications for support under the CJRS.
51. The Commissioner understands that the information – details of fraudulent use of the CJRS, is of possible interest to individuals, particularly to those that were not eligible for funding support. However, disclosure under the FOIA is disclosure to the world at large. The Commissioner must therefore consider whether the information is suitable for disclosure to everyone.
52. In view of this, the Commissioner is mindful that HMRC expressed concerns that disclosure, which relates to a large number of ongoing investigations, would considerably impact on the public purse. She understands the aim of HMRC is to balance the provision of money to those individuals that need it and preventing misuse of the CJRS. The Commissioner also accepts that disclosing information would allow fraudsters to effectively estimate the success rate of HMRC in locating such activities, and in pursuing prosecutions concerning the CJRS. It is clear that this could lead to unlawful activity because these individuals could determine how likely it is or is not that they would be caught.
53. She has taken into account the argument that release of the information would be likely to encourage criminal activities which could undermine the scheme, and impact on the support which the government offers.

54. The Commissioner notes that a significant amount of information about the CJRS is already available in the public domain. Such publications indicate that some of the complainant's concerns (questions 3, 5, and 7 – 12) had later been addressed and are available within the NAO report. The Commissioner considers that the available information goes some way towards satisfying the public interest in scrutinising HMRC's compliance action in response to fraudulent use of the CJRS and how fraudulent claims are being investigated. Whilst the Commissioner recognises that the complainant has his own concerns about this, she does not consider that provision of the requested information would add any particular value to these concerns, which are already known.
55. The Commissioner does however, consider it would be counter to the public interest for fraudsters to be given further material which could potentially assist in the furtherance of the commission of crime – both reducing the likelihood of detection and increasing the likelihood of subsequent evasion. She considers this argument to be of considerable weight in favour of maintaining the exemption.

### **The Commissioner's conclusion**

56. The Commissioner's decision, having considered all the arguments in this case, is that the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore, section 31(1)(a) of the FOIA was correctly applied to the withheld information and HMRC was not obliged to disclose this information.

## Other matters

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### *Internal review*

57. The Commissioner wishes to place on record the untimely response by HMRC to the complainant's request for internal review.
58. The Commissioner notes that the complainant did not receive a timely response to his request for an internal review. Following a number of reminders to HMRC regarding its repeated and unreasonable delays, HMRC responded with numerous explanations and failed promises to provide its internal review outcome to the complainant.
59. The complainant asked HMRC for an internal review of his request on 7 July 2020 and HMRC's outcome was not provided to him until 17 March 2021. This was following the Commissioner's intervention when she received a complaint on 28 October 2020 about not receiving HMRC's internal review response.
60. The Commissioner considers that a reasonable time for completing an internal review is 20 working days after the date of the request for review. The maximum amount of time taken should not be more than 40 working days.
61. HMRC acknowledged and apologised for not providing the complainant with a timely response to his internal review request. HMRC refuted the complainant's claim that this delay was deliberate, and explained that due to the strain across the Civil Service during the pandemic, that this may have resulted in a delayed response.
62. Although HMRC subsequently provided the complainant with its internal review outcome, she would still expect HMRC to take note of the way it has handled this request and to ensure timely and effective responses are provided.
63. On receipt of the complaint – 28 October 2020, HMRC was directed to Section 45 Code of Practice which contains guidance on internal reviews. It was also directed to our Regulatory Action Policy which is published on our website. HMRC was informed that significant or repeated unreasonable delays in dealing with internal reviews will be monitored, and that in some instances regulatory action may be necessary.

## Right of appeal

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64. 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)

65. 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.
66. 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**