

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2022

Public Authority: His Majesty's Revenue & Customs
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant requested from His Majesty's Revenue & Customs (HMRC) information regarding a witness statement produced by [name redacted] for the case of The Queen (on the application of Derry) v HMRC. HMRC refused the request under section 44(1)(a) (prohibitions on disclosure) of FOIA.
2. The Commissioner's decision is that HMRC is entitled to rely on section 44(1)(a) of FOIA to withhold the requested information. Therefore, the Commissioner does not require HMRC to take any steps as a result of this decision.

Request and response

3. On 16 February 2022 the complainant wrote to HMRC and requested information in the following terms:

"I am writing to request a copy of a witness statement produced by [name redacted], an officer of Revenue and Customs, for the case of The Queen (on the application of Derry) v HMRC. This case was heard at first instance by the Upper Tribunal (Tax & Chancery Chamber) on 30 March to 1 April 2015. It was case number TCC/JR/08/14, reported as [2015] UKUT 416 (TC) (Morgan J). The statement was referred to by Morgan J at [46] of his decision and elsewhere. It was also referred to by Lord Carnwath in the Supreme Court decision in the case.

To assist I should say that there are two places within HMRC where this document may be found. One is in the Solicitors' Office as that office would have had conduct of the proceedings. The other is the Anti-Avoidance section of HMRC as [name redacted] was working in that section at the time and the case is about tax avoidance."

4. On 24 February 2022 HMRC responded and confirmed that it holds the information requested. HMRC refused the request under section 44(1)(a) of FOIA.
5. On 3 March 2022 the complainant requested an internal review.
6. On 24 March 2022 HMRC provided its internal review. It upheld its original decision to withhold the information under section 44(1)(a) of FOIA as section 23(1) of the CRCA applies to "person" identifying information.

Scope of the case

7. The complainant contacted the Commissioner on 11 May 2022 to complain about the way his request for information had been handled.
8. The following analysis focuses on whether HMRC was entitled to rely on section 44(1)(a) of FOIA to withhold the information.

Reasons for decision

Section 44 – prohibitions on disclosure

9. 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."

Is disclosure of the requested information prohibited by or under any enactment

10. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:
 - primary legislation (an Act of Parliament); or

- secondary legislation (a Statutory Instrument).
11. The relevant legislation in this case is the Commissioners for Revenue and Customs Act 2005 (CRCA)¹.
 12. Section 18(1) of the 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 23 CRCA 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.....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.”

13. The Commissioner’s position on the interaction of the FOIA at section 44 and the CRCA is well established via published decision notices.

HMRC’s position

14. HMRC set out its position to the complainant with regard to section 44 of FOIA. It detailed that the relevant enactment is the CRCA and the relevant section of that Act is section 23(1).
15. HMRC said the exemption is appropriate in this case as HMRC is legally required to keep taxpayer information confidential. The request is for a copy of a witness statement, which is information that would identify individual taxpayers. HMRC explained “Information held in connection with one of our functions must be withheld if releasing it would lead to the identification of a person. The level of information already in the public domain about a person does not affect how we address a request.

¹ <https://www.legislation.gov.uk/ukpga/2005/11/contents>

This means published tribunal decisions and other related information do not alter how we treat a request that seeks information connected to a named person.” HMRC further explained that its decision-making process is based purely on its legal duty to protect taxpayer information. HMRC must therefore comply with the provisions of the Commissioners for Revenue and Customs Act 2005 (CRCA).

16. HMRC provided three examples of scenarios where it publishes information about taxpayers – deliberate tax defaulters, employers claiming Coronavirus Job Retention Scheme payments, tax avoidance litigation decisions.
17. HMRC stated section 18(2) of the CRCA does list a number of circumstances that allow for the disclosure of revenue and customs information and provided examples of these. However, HMRC said that the section 18(2) list of circumstances does not include the FOIA. Disclosure under that act is governed only by section 23 of the CRCA which defines as “exempt information” revenue and customs information that, if disclosed, would identify a person, or allow their identity to be deduced. HMRC also said that section 23(1A) adds that section 18 subsections (2) and (3) are to be disregarded when considering a request.
18. HMRC informed the complainant that it issues a refusal notice to any request that seeks information exempt under section 44 of the FOIA, and this is its consistent position when handling requests that relate to an identifiable person. In this instance, the requested information is a witness statement and HMRC said that this only exists because of a case involving a specific taxpayer. Therefore, HMRC explained that this cannot be separated and treated as information that does not relate to an identifiable person.
19. HMRC reiterated the refusal of this request under section 44(1)(a) of FOIA, and stated its duty of confidentiality set out in the CRCA – section 23(1) which applies to “person” identifying information.

The Commissioner’s position

20. The Commissioner’s remit is to consider whether a request for information under FOIA has been handled in accordance with the ACT. Whilst he understands the points raised by the complainant, the Commissioner considers that the CRCA prohibits the disclosure of the information and that this prohibition is not subject to the availability of any additional information which may enable identification.

21. The Commissioner considers the initial response adequately explains the interaction between the CRCA and the FOIA, and it is clear that HMRC cannot, under FOIA, disclose any information which would identify a person or enable identification of a person. The Commissioner is satisfied that this is explained further in the internal review response.
22. The Commissioner accepts that disclosing the withheld information, a copy of a witness statement, would specify the identity of the person to whom it relates.
23. Section 44(1)(a) FOIA is an absolute exemption, this means that there is no requirement to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.
24. It is the Commissioner's position that HMRC had satisfactorily established the criteria set out in the CRCA at sections 18 and 23 are clearly met in this case. In conclusion, the Commissioner's decision is that HMRC was entitled to rely on section 44(1)(a) of FOIA to withhold the requested information.

Right of appeal

25. 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

26. 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.
27. 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
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