

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2022

Public Authority: HM Revenue and Customs

Address: 100 Parliament Street

London

SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information from HM Revenue and Customs ('HMRC') relating to contractors who were subject to the 2019 Loan Charge. HMRC disclosed some information to the complainant but refused to disclose the remainder ('the withheld information') citing section 44(1)(a) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that HMRC has correctly applied section 44(1)(a) of FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 11 November 2020, the complainant wrote to HMRC and requested information in the following terms:

"Following the information published in FOI2020/01832, which details 18 x different contractors (listed and identified in your response as Contractor 'A' through to Contractor 'R') who worked directly or indirectly for HMRC and/or RCDTS, please confirm:

- a) which of these 18 x contractors (by using the same alphabetic identifiers) are subsequently affected by the 2019 Loan Charge, and
- b) which of those same 18 x contractors have received communication to that effect from HMRC."

5. On 9 December 2020 HMRC responded. It provided the complainant with some information within the scope of part a) of their request, however it did not provide information in respect of part b).
6. The complainant requested an internal review, a response to which was provided by HMRC on 16 March 2021. In HMRC's initial response to the complainant, it effectively stated that any contractor out of the 18 specified (A to R) who was engaged after 5 April 2019 would not have been subject to the Loan Charge.
7. The complainant in their request for internal review stated that the start dates of contractors H and I were not clear as they only specified '2019' so the complainant could not deduce from that whether they were subject to the Loan Charge. The complainant asked in that internal review request that HMRC list the contractors which would have been subject to the Loan Charge, excluding F and G as their start dates were December 2019. Therefore the outstanding information sought by the complainant was which of the remaining contractors were subject to the Loan Charge.
8. The complainant also stated that the second part of their request had not been dealt with in that HMRC had not specified which of the contractors subject to the Loan Charge would have received communication about this from HMRC.
9. In HMRC's internal review response it provided some background to the Loan Charge. It also indicated that, if it were to provide the specific information requested by the complainant, that information, coupled with other FOIA requests which had been made, could lead to the identification of the contractors. Therefore HMRC applied section 44(1)(a) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 21 May 2021 to complain about the way their request for information had been handled.
11. The Commissioner has considered HMRC's handling of the complainant's request, in particular its application of section 44(1)(a) of FOIA to the withheld information.

Reasons for decision

Section 44 – Prohibitions on disclosure

12. Section 44 is an absolute exemption. This means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.
13. 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 courtCommissioners for Revenue and Customs Act
14. Section 18 of the Commissioners for Revenue and Customs Act 2005 ('CRCA') refers to the duty of confidentiality by which all HMRC officials are bound. It specifies however that such confidentiality only applies to information held by HMRC for the purposes of fulfilling its core purposes and not information held for administrative purposes.
15. HMRC has explained that the relevant prohibition in this case is section 23(1) of the CRCA which 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 (prohibitions on disclosure) 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."

The Commissioner's analysis

16. Firstly, the Commissioner is satisfied that the requested information is held by HMRC in connection with its function of assessing and collecting tax. Therefore the information falls under section 18 of the CRCA and is prohibited from disclosure.
17. The Commissioner must now consider if disclosure would, as section 23(1) of the CRCA states, identify the person to whom the information relates. If this is not the case then section 18 of the CRCA and by

extension, section 23(1) of the CRCA and section 44(1)(a) of FOIA cannot be engaged.

18. The Commissioner understands that the term 'person' includes both individuals and legal persons such as organisations. The Commissioner has previously upheld HMRC's position that schemes themselves also will represent legal persons.¹ Therefore, if compliance with part 1 of the request could identify any of these persons, the information is exempt.

HMRC's position

19. HMRC's position is that, when previously disclosing information on this issue, it has taken all necessary steps to ensure that the level of detail provided is such that the personal tax affairs of individuals cannot be deduced. This request, in conjunction with others received, seeks an additional level of detail such that it would likely be possible for the individuals concerned to be identified either by a 'motivated intruder' or the contractor themselves.
20. Although all relevant contractors have used disguised remuneration (DR) schemes, whether the scheme usage results in the contractor being subject to the Loan Charge will be dependent upon the specifics of their case. The Loan Charge applies to disguised remuneration loans that were outstanding on 5 April 2019. It does not however apply to all forms of scheme and can be avoided either by settling with HMRC or repaying the loan amount. In some cases, the department had published details of contractors who had used schemes after the Loan Charge cut-off date of 5 April 2019. Whilst the Loan Charge would not apply to these loans, it is possible that the contractors may have used such schemes prior to their engagement with HMRC and so are subject to the Loan Charge for work unrelated to that with the department.
21. It is HMRC's position that the risk of identification is heightened by further requests received regarding the specific schemes used by these contractors. The request which is the subject of a similar FOIA complaint asked for alphabetic identifiers to be assigned to the relevant schemes and to then be attributed to individual contractors. Disclosure of such information would show cases where contractors had used the same scheme. It would also provide a timeframe in which that scheme was operating and in conjunction with the other requested information would identify whether the scheme was subject to the Loan Charge.

¹ FS50793047

22. HMRC has explained in weighing up the risk of identification, 'HMRC refers to the ICO's Anonymisation Code of Practice² as well as the National Statistician Guidance: Confidentiality of Official Statistics. As part of assessing identifiability risk, HMRC has considered whether an intruder would be able to achieve identification if they were motivated to attempt it. This is what is known as the 'motivated intruder' test and is used by both the Commissioner and the Tribunal.
23. Ultimately, HMRC is concerned that compliance with this request, and other requests that it has complied with, would allow a motivated intruder to learn the following about the 18 contractors cited in the request:
- “• that they had worked for HMRC as a contractor
 - the mechanism through which they had been engaged
 - the period of time for which they had occupied this role
 - the circumstances surrounding their departure from this role
 - that they had used a tax avoidance scheme
 - that they are subject to ongoing compliance action into their tax affairs
 - the scheme they had used.”
24. In April 2019, the Loan Charge All-Party Parliamentary Group (APPG) published a report³ and on page 50 it discusses submissions from workers employed for HMRC whilst utilising DR schemes. The APPG published another report in February 2021⁴ which provided further details, and HMRC informed the Commissioner that still further details may be provided in the future.

²[Anonymisation: managing data protection risk code of practice \(ico.org.uk\)](https://ico.org.uk/Anonymisation-managing-data-protection-risk-code-of-practice)

³ [Microsoft Word - Loan Charge Inquiry Report April 2019 FINAL.docx \(loanchargeappg.co.uk\)](https://loanchargeappg.co.uk/Microsoft%20Word%20-%20Loan%20Charge%20Inquiry%20Report%20April%202019%20FINAL.docx)

⁴ [Loan-Charge-APPG-report-on-HMRC-use-of-contractors-using-DR-schemes-February-2021-min.pdf \(loanchargeappg.co.uk\)](https://loanchargeappg.co.uk/Loan-Charge-APPG-report-on-HMRC-use-of-contractors-using-DR-schemes-February-2021-min.pdf)

25. Public authorities are entitled to look at the effect of the disclosure in the context of existing information already in the public domain. In this case, HMRC accepts that disclosure of the information in isolation would not serve to identify individual persons. However, disclosure would likely lead to identification when combined with pre-existing material as well as that requested at the same time. Disclosure of such information may also lead to future requests on this matter. This is sometimes referred to as a 'mosaic' or 'jigsaw' effect.
26. In this particular case, HMRC has concluded that the risk of identification is greater than remote. The information relates to a small number of individuals, the identities of which could be deduced from information in the public domain by either a motivated intruder, the APPG secretariat, the individual themselves or those close to them. HMRC also acknowledges the risk that anonymised evidence provided to the APPG could be published in the future which, when combined with that released under FOIA would readily identify the individuals. HMRC therefore concludes that it is entitled to rely on section 44(1)(a) of the FOIA as a basis for withholding the information

The Commissioner's view

27. The Commissioner has studied the information already in the public domain on the 18 contractors in question and the DR schemes. Specifically, the Commissioner has studied the information disclosed in response to a previous FOI request and the APPG report.
28. HMRC has stated 'The information relates to a small number of individuals and schemes, the identities of which could be deduced from information in the public domain by either a motivated intruder, the APPG secretariat, the person themselves or those close to them. HMRC also acknowledges the risk that anonymised evidence provided to the APPG could be published in the future which, when combined with that released under the FOIA would readily identify the persons.'
29. The Commissioner notes the APPG's most recent report states 'The Loan Charge APPG had other such testimonies at the time and has since received several more from contractors who had worked for HMRC.'
30. The Commissioner is mindful that the requested information relates to a relatively small number of schemes and individuals, who, although have not been identified, have been placed under quite intense scrutiny due to their use of DR schemes and subsequent association with HMRC. The Commissioner cannot rule out the possibility that these individuals have provided intelligence to APPG.
31. The Commissioner is also mindful that specific information may be more attractive to motivated intruders such as information that may

reveal newsworthy information or information that may be used for political or activist purposes, for example, against a particular individual or organisation. The Commissioner's guidance⁵ explains that 'data with the potential to have a high impact on an individual is most likely to attract a 'motivated intruder'.

32. The complainant has explained that they have no interest in identifying any of the 18 contractors as a result of their request. However, disclosure under FOIA is disclosure to the world at large, not just the requestor. Just because the complainant is not motivated to use this information to identify the individuals involved does not mean that others would not – this includes the APPG.
33. Usually when considering identification, the Commissioner takes into account whether an individual could learn anything new about the data subject from disclosure. Even though disclosure may only confirm what the APPG already knows about specific contractors or schemes, section 23(1)(b) of the CRCA is clear - if the identity of the individual to whom the information relates can be deduced, it is exempt.
34. The Commissioner is mindful that section 44 is an absolute exemption and, therefore, he cannot take into account whether or not it is within the public interest for these individuals to be identified. If the disclosed information could, as section 23(1) of the CRCA states, lead to the identification of the individuals to whom the request relates, or allow their identity to be deduced from said information, it is exempt under section 44(1)(a) of FOIA.
35. Since the Commissioner is satisfied that individuals could be identified from the requested information, section 23(1) of the CRCA is engaged and, by extension, the information is exempt from disclosure in accordance with section 44(1)(a) of FOIA.

⁵ [Anonymisation: managing data protection risk code of practice \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-the-information-commissioner's-office/2018-05-01-anonymisation-managing-data-protection-risk-code-of-practice)

Right of appeal

36. 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

37. 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.
38. 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

Deirdre Collins
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