

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 11 April 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 relating to outcomes of appeals contained in HM Revenue and Customs (HMRC) annual reports.
2. The Commissioner's decision is that HMRC is entitled to rely on section 44(1)(a) FOIA – prohibition on disclosure, to refuse the request.
3. The Commissioner does not require HMRC to take any steps as a result of this decision notice.

Request and response

4. On 26 February 2021, the complainant wrote to HMRC and requested information in the following terms:

"HMRC's Annual Report and Accounts, since the 2016-17 edition, has contained a table of "Outcomes of Appeals Heard" before the tribunals and the courts, classifying cases into "HMRC win", "Taxpayer win" and "Partial win" (or words to the same effect). Specifically those tables are found at:

- *HMRC's Annual Report and Accounts 2019-20 Table 5 (page 116)*
- *HMRC's Annual Report and Accounts 2018-19 Figure 22 (page 110)*
- *HMRC's Annual Report and Accounts 2017-18 Figure 31 (page 97)*
- *HMRC's Annual Report and Accounts 2016-17 Figure 41 (page 109)*

– please note this also includes First-tier Tribunal decisions in 2015-16, which are therefore also within the scope of this request.

Please will you send me the underlying data from which these figures are calculated. Specifically, please include in that data (i) the name of each case; (ii) the year to which that case relates; (iii) whether it is categorised as a "HMRC win", "Taxpayer win" and "Partial win" (or words to the same effect); (iv) which court/tribunal decided the case (eg the First-tier Tribunal or Court of Appeal); (v) if such data is available in your records and does not cause this request to exceed the cost limit, please also supply the neutral citation (or if not available other case reference) for the case. Given that the underlying court decisions are all public I do not consider that HMRC's obligations of taxpayer confidentiality, or any FOIA exemption, are engaged. Indeed, I note that you provide much of the information that I am requesting on your website, but only in respect of avoidance cases.

See for example: <https://www.gov.uk/government/publications/tax-avoidance-litigation-decisions>

The fact that you publish this information on avoidance cases would suggest that there is no reason justifying not providing the information I am requesting in this instance. I know not all tax tribunal decisions are published: eg summary and short decisions are not published and info notice (Schedule 36) decisions are not published. If you are only able to provide the information in respect of published cases then please provide the full information requested as it relates to published cases only. But, to the extent that you are able to provide the information in relation to unpublished cases, I would be grateful."

5. HMRC responded on 19 March 2021 and refused to provide the requested information. It cited section 44(1)(a) by virtue of sections 18(1) and 23 of the Commissioners for Revenue and Customs Act, (CRCA) 2005.
6. Following intervention by the Commissioner HMRC provided its internal review on 5 November 2021 and maintained its position.

Scope of the case

7. The complainant contacted the Commissioner 21 June 2021 to complain that they had not received a response to their internal review. On 20 December 2021 the complainant contacted the Commissioner again to advise they remained dissatisfied. The complainant also stated:

"The review from HMRC fails to engage with the core of my argument, being that the information I request is not confidential as it is the outcome of litigation."

8. In further correspondence to the Commissioner the complainant stated:

"Any confidentiality that may have existed is thereby destroyed by the litigation process. Clear authority for this is *HMRC v Banerjee (No 2)* [2009] EWHC 1229 (Ch) at [38]. Clear authority that HMRC's duty to keep information confidential only applies to information that is (still) confidential is found in *R (on the application of Ingenious Media Holdings plc and another) v Revenue and Customs Commissioners* [2016] UKSC 54 at [24]-[25]. Accordingly, it is incorrect for HMRC to claim that s 44 of the Freedom of Information Act 2000 prohibits disclosure.

Any confidentiality that might have existed was destroyed by the publication of the court decisions. I rely on *R (on the application of Ingenious Media Holdings plc and another) v Revenue and Customs Commissioners* [2016] UKSC 54 at [24]-[25] and *HMRC v Banerjee (No 2)* [2009] EWHC 1229 (Ch) at [38].

Specifically, section 18 of the Commissioners for Revenue and Customs Act 2005 only applies to **confidential information** as is made clear by Lord Toulson in *R (on the application of Ingenious Media Holdings plc and another) v Revenue and Customs Commissioners* [2016] UKSC 54; [2016] STC 2306 at [24]-[25].

"It was argued by HMRC that despite being headed "Confidentiality", section 18 is not confined to information which is in any real sense confidential, but is far wider in its scope. Therefore, it was argued, the exception contained in subsection (2)(a)(i) must be given a similarly expansive interpretation in order to avoid absurdity. In support of this argument HMRC relied on the wording of section 19, which makes it a criminal offence for an official to disclose revenue or customs information relating to an identifiable person, but provides a defence if the person charged proves that he reasonably believed that "the information had already and lawfully been made available to the public". The creation of this defence showed, in HMRC's submission, that section 18 was not essentially or only about protecting confidentiality, because it self-evidently extended to the disclosure of information which was already in the public domain.

This argument found favour with the Court of Appeal, but I do not consider that it bears the weight which HMRC seeks to put on it. The argument is too subtle, and it is open to other objections. It is well settled that information may be available to the public and yet not

sufficiently widely known for all confidentiality in it to be destroyed. As Eady J put it in *McKennitt v Ash*[2006] EMLR 10, para 81, where information has been obtained in circumstances giving rise to a duty of confidentiality, "the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected". Whether that stage has been reached may be a hard question on which reasonable people may disagree. It is a fallacy to suppose that because a defence to a criminal charge under section 19 is available to a person who reasonably believed the information to be available to the public, it must follow that Parliament intended section 18 to prohibit the disclosure of information of the most ordinary kind about which there could be no possible confidentiality. Moreover, even if section 18(1) has the wide scope suggested by HMRC (which it is not necessary to decide in this case), it does not follow that Parliament must be taken to have intended by subsection (2)(a)(i) to confer on officials a wide ranging discretion to disclose confidential information about the affairs of individual taxpayers"

The information I requested is not confidential, as any confidentiality in the information (who won or lost in a litigated tax case) has been destroyed by it being published by a court/tribunal as a judgment. Authority for this is *HMRC v Banerjee (No 2)* [2009] EWHC 1229 (Ch) at [38],

"If, as I think, an application for the appeal to be heard in private would have been rejected, I agree with the Revenue that the application which Dr Banerjee now makes, following a public hearing, has even less chance of success. The pre-ponderance of English authority supports the view that once material has been read or referred to in open court, it enters the public domain. It seems to me that there is a need for a clear and simple rule on this point, which reflects the principle of open justice, and which can be overridden, it at all, only in exceptional circumstances where the interests of justice so require, the general rule is also reflected in the right of any interested member of the public to obtain a transcript of any judgement given or order made at a public hearing, subject to payment of the appropriate fee; see paragraph 1.11 of the Practice Direction to CPR Part 39. It is true that the paragraph refers only to judgements or orders, but I see no reason why an interested person should not also be able to obtain a transcript of the entire proceedings which took place in open court. After all, such a person would have had the right to sit in court and take notes, and if was a shorthand writer, he could have taken a verbatim note. The right to obtain a full transcript would therefore add nothing to what he could, in principle, have done for himself by attending the hearing, the touchstone, in my

view, is whether the hearing in question is held in public, not whether it is in fact attended by any member of the public.”

9. The Commissioner considers the scope of this investigation to be to determine if HMRC is entitled to rely on section 44(1) FOIA to refuse to provide the requested information.

Background

10. HMRC is a statutory body with statutory functions and a statutory duty of confidentiality which are set out in legislation in the CRCA 2005.
11. It is the UK's tax, payments and customs authority and its core purpose is to:
 - collect the money to fund the UK's public services
 - help families and individuals with targeted financial support and
 - through its customs service facilitate legitimate trade and protect the UK's economic, social and physical security.
12. The duty of confidentiality prohibits HMRC officials (and those acting on behalf of the Commissioners) from disclosing information held by HMRC in connection with its functions. This prohibition applies to all information held by HMRC in connection with its functions and reflects the importance placed on 'taxpayer confidentiality' by Parliament when the Department was created.
13. The effective functioning of the department was felt to depend critically on its customers being able to trust that the information held on them would be appropriately protected and would be disclosed only in controlled, limited circumstances. There is additional protection for information that relates to an individual or legal entity whose identity is specified in the disclosure or can be deduced from it ('identifying information') in the form of a criminal sanction for wrongful disclosure. HMRC is committed to being as transparent as possible while complying with its statutory duty of confidentiality.
14. It is part of HMRC's functions to publish information that promotes public understanding of its work and increases accountability and public confidence. All information releases consider HMRC's obligation to collect the taxes for which it is responsible and the impact that publication will have on tax collection, including the need to protect sensitive and personal information provided by individual taxpayers in order to encourage openness and promote voluntary compliance.

Reasons for decision

15. The first part of this decision notice details the parts of FOIA and CRCA that have been relied on to withhold the requested information.

Section 44 – Prohibitions on disclosure

16. 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.

17. Section 44 of the 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

Commissioners for Revenue and Customs Act

18. Section 23 provides:

Freedom of information

(1) 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.

(1A) Subsections (2) and (3) of section 18 are to be disregarded in determining for the purposes of subsection (1) of this section whether the disclosure of revenue and customs information relating to a person is prohibited by subsection (1) of that section.

(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.

(3) In subsection (1) 'revenue and customs information relating to a person' has the same meaning as in section 19.

19. Section 23(1) refers to section 18:

Confidentiality

(1) 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.

(2) But subsection (1) does not apply to a disclosure—

(a) which—

(i) is made for the purposes of a function of the Revenue and Customs, and

(ii) does not contravene any restriction imposed by the Commissioners,

(b) which is made in accordance with section 20 or 21,

(c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,

(e) which is made in pursuance of an order of a court,

(f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,

(g) which is made to the Director General of the Independent Office for Police Conduct, or a person acting on the Director General's behalf, for the purpose of the exercise of a function by virtue of section 28,

(h) which is made with the consent of each person to whom the information relates,

(i) which is made to Revenue Scotland in connection with the collection and management of a devolved tax within the meaning of the Scotland Act 1998,

(j) which is made to the Welsh Revenue Authority in connection with the collection and management of a devolved tax within the meaning of the Government of Wales Act 2006, or

(k) which is made in connection with (or with anything done with a view to) the making or implementation of an agreement referred to in section 64A(1) or (2) of the Scotland Act 1998 (assignment of VAT).

(2A) Information disclosed in reliance on subsection (2)(k) may not be further disclosed without the consent of the Commissioners (which may be general or specific).

(3) Subsection (1) is subject to any other enactment permitting disclosure.

(4) In this section—

...

(c) a reference to a function of the Revenue and Customs is a reference to a function of—

(i) the Commissioners, or

(ii) an officer of Revenue and Customs, ...

20. CRCA sets out a number of functions of the Commissioners and officers of Her Majesty's Revenue and Customs. Section 5(1)(a) will suffice as an example. This provides that 'The Commissioners shall be responsible ... for the collection and management of revenue'.

21. Section 9(1) provides:

Ancillary powers

(1) The Commissioners may do anything which they think-

(a) necessary or expedient in connection with the exercise of their functions, or

(b) incidental or conducive to the exercise of their functions.

And 'function' is defined in section 51(2)(a):

(2) In this Act-

(a) 'function' means any power or duty (including a power or duty that is ancillary to another power or duty), and

(b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred-

(i) by or by virtue of this Act, or

(ii) by or by virtue of any enactment passed or made after the commencement of this Act.

22. In other words, when CRCA refers to functions, that includes powers relevant to those functions.
23. Section 23(3) adopts the definition of 'revenue and customs information relating to a person' from section 19:

Wrongful disclosure

(1) A person commits an offence if he contravenes section 18(1) or (2A) or 20(9) by disclosing revenue and customs information relating to a person whose identity—

- (a) is specified in the disclosure, or
- (b) can be deduced from it.

(2) In subsection (1) 'revenue and customs information relating to a person' means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others).

Commissioner's analysis

24. 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.'
25. The Commissioner shares the view that the information is held by HMRC in connection with its function of assessing and collecting tax. Therefore the information falls under section 18(1) CRCA and is prohibited from disclosure.
26. The next matter to consider is whether section 23(1) CRCA is also relevant. Section 23(1) specifically designates information as exempt from disclosure under section 44(1)(a) FOIA, if its disclosure would identify the person to whom it relates or would enable the identity of such a person to be deduced. The term "person" includes both natural and legal persons.
27. The complainant has argued that:

Given that the underlying court decisions are all public I do not consider that HMRC's obligations of taxpayer confidentiality, or any FOIA exemption, are engaged.

28. HMRC is aware that the complainant has directed the Commissioner to two judgments which they consider shows the prohibition at section 18(1) CRCA to not apply on the basis that the requested information is not confidential in nature.
29. HMRC disagreed with the relevance of these judgments and the context in which they have been presented. It noted that neither judgment concerns information provided under FOIA which is dealt with at section 23 CRCA.
30. It argued that neither section 23 nor the definition of revenue and customs information relating to a person requires HMRC to make any allowances for information which may already be in the public domain.
31. Section 23 CRCA is expressed in such a way as to be certain that under FOIA, no-one is entitled to information HMRC holds relating to a person. This may on occasion have the effect of catching information that is in the public domain, but that is a proportionate incident to the certainty of taxpayer protection under FOIA that the prohibition seeks to achieve.
32. The requested information clearly relates to identifiable persons. In the words used in section 19(2) CRCA, it is held in connection with the exercise of a function of the public authority and from that, the persons to whom the information relates are identifiable. The test, it should be noted, is not whether the information sought is taxpayer confidential. It is whether the information would specify the identity of a person to whom it relates or would enable their identity to be deduced.
33. On this basis, HMRC maintained that it is entitled to withhold the requested information by virtue of section 44(1)(a) FOIA.
34. The Commissioner has considered the complainant's arguments that there is no duty of confidentiality as the cases have been through the courts and are a matter of public record.
35. However, he is not persuaded that this a strong enough argument to override the specific sections of the CRCA which clearly state when information is prohibited from disclosure.
36. Therefore the Commissioner finds that HMRC was entitled to withhold the requested information on the basis of section 44(1)(a) FOIA.

Right of appeal

37. 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

38. 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.
39. 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

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