

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 January 2022

Public Authority: HM Revenue & Customs
Address: 100 Parliament St
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant submitted a request to HM Revenue and Customs (HMRC) seeking emails exchanged between two senior officials about disguised remuneration tax avoidance schemes. HMRC relied on section 14(1) of FOIA to refuse to answer the request because it considered it to be vexatious.
2. The Commissioner's decision is that HMRC is entitled to rely on section 14(1) of FOIA to refuse the request.
3. No steps are required.

Background

4. The request which is the focus of this complaint concerns disguised remuneration tax avoidance schemes. HMRC's website contains the following information about such schemes:

'Disguised remuneration tax avoidance schemes claim to avoid the need to pay Income Tax and National Insurance contributions. They normally involve a loan or other payment from a third-party which is unlikely to ever be repaid.'

These schemes are used by employers and individuals. If they're used by contractors, they're often known as contractor loans.

A charge on disguised remuneration loans, known as the loan charge, was introduced to tackle the use of disguised remuneration schemes and came into effect on 5 April 2019. The charge applies to loans made after and including 9 December 2010, if they were still outstanding on 5 April 2019.¹

5. By way of further background, it is also relevant to note that the complainant submitted a request to HMRC in November 2018 seeking information in relation to the number of contractors to the department discovered to have been using disguised remuneration schemes whilst engaged by the department. The request did not specify a timeframe for this request and therefore HMRC interpreted the request as seeking information from 2005 (ie the date the department was formed) to the date of request. HMRC responded by stating that it did not hold any information in scope. The Commissioner issued a decision notice on 18 December 2019 upholding this position.²
6. In October 2020, HMRC disclosed under FOIA that in November 2019 it had identified number of departmental contractors who had used disguised remuneration tax avoidance schemes during the period 2016 onwards. This discovery was made following new analysis of compliance data not previously available to HMRC at the time it processed the complainant's request of November 2018.

Request and response

7. The complainant submitted the following request to HMRC on 21 December 2020:

'The request [ie a request the complainant had submitted to HMRC on 4 December 2020] was for:

Please supply a copy of all emails to/from Jim Harra [HMRC's First Permanent Secretary and Chief Executive] from 30/9/2020 to 4/12/2020 that contain the following phrases "disguised remuneration"

"DR-Scheme" or abbreviation such as DR

¹ <https://www.gov.uk/government/collections/tax-avoidance-disguised-remuneration>

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2616843/fs50822158.pdf>

"Loan Charge" or abbreviation such as LC"

You have rejected on the grounds that there would be too many emails in this two month period [HMRC rejected this on the basis of section 14(1) of FOIA]

In order to limit the number of emails, please provide emails only between Jim Harra and Mary Aiston [Director of Counter Avoidance] that contain the phrases defined above.'

8. HMRC responded to the request on 19 January 2021 and explained that it considered it to be vexatious and was therefore refusing to comply with it on the basis of section 14(1) of FOIA.
9. The complainant contacted HMRC on 14 February 2021 and asked it to conduct an internal review of this refusal.
10. HMRC informed him of the outcome of the internal review on 23 March 2021. The review upheld the application of section 14(1) of FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 30 March 2021 in order to complain about HMRC's refusal of his request. He disputed that his request was vexatious (the complainant's grounds of complaint to support this position are set out below).

Reasons for decision

12. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered it to be vexatious.
13. Whilst the term 'vexatious' is not defined in FOIA, in the case of the *Information Commissioner v Devon CC and Dransfield* the Upper Tribunal commented that the term could be defined as the '*manifestly unjustified, inappropriate or improper use of a formal procedure*'.³ The Upper Tribunal's definition clearly established that the concepts of

³ [2016] UKUT 0273 (AAC)
https://assets.publishing.service.gov.uk/media/578f2b5aed915d3cfd000179/GIA_0246_2015-00.pdf

proportionality and justification are relevant to any consideration of whether a request is vexatious.

14. In the *Dransfield* case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues; (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3), the value or serious purpose of the request, and (4), harassment or distress of, and to, staff.
15. However, the Upper Tribunal did also caution that these considerations were not meant to be exhaustive. Rather, it stressed the importance of:
'adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.' (paragraph 45).
16. The Commissioner's guidance on section 14(1) sets out a number of indicators that may apply in the case of a vexatious request.⁴ The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether a request is vexatious, including the context of the request and the history of the public authority's relationship with the requester, when this is relevant.

The complainant's position

17. The complainant explained that the scope of this request was limited to emails between two named individuals over a two month period on a specific topic. In his view complying with this request would not prove to be burdensome to HMRC. Moreover, he noted that this was a refined version of a broader request, ie the request of 4 December 2020, that he had previously submitted to HMRC.
18. He noted that HMRC had argued that this was a 'fishing request'. The complainant disputed this position and argued that his request had a specific purpose, one which he had informed HMRC in his request for a internal review of, namely 'It is clear from HMRC's performance in front of the House of Lords [on this subject] that the evidence being

⁴ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

presented was less than compelling. This FOI directly targets emails that may have been exchanged during this time discussing the subject'. The complainant argued that he considered it to be in the public interest that the requested series of emails was released. He argued that one of the fundamental reasons for the creation of FOIA was to ensure that our public bodies and their functions can be open to scrutiny by any citizen of the UK.

19. The complainant also explained that HMRC have provided redacted emails for previous requests in the past to both himself and others on this subject. He argued that this request is no different to those requests although what the information falling within the scope of emails will reveal should be.

HMRC's position

20. HMRC provided the Commissioner with detailed submissions to support its reliance on section 14(1) of FOIA. The Commissioner has summarised these submissions below.

Assessing purpose and value

21. HMRC noted that the Commissioner's guidance explained that whilst FOIA is generally considered to be applicant blind, this does not prevent public authorities from taking into account the wider context in which the request is made and any evidence the applicant is willing to volunteer about the purpose behind their request.
22. As result HMRC noted that a public authority can consider any comments the applicant might have made about the purpose behind their request, and any wider value or public interest in making the requested information publicly available. However, HMRC argued that if the request does not obviously serve to further the requester's stated aims or if the information requested will be of little wider benefit to the public, then this will restrict its value, even where there is clearly a serious purpose behind it.
23. HMRC highlighted that the Commissioner's guidance included a number of scenarios where the value of a request might be limited where the requester:
 - Submits a request for information that has no obvious relevance to their stated aims.
 - Argues points rather than asking for new information.
 - Raises repeat issues which have already been fully considered by the authority.
 - Refuses an offer to refer the matter for independent investigation or ignores the findings of an independent investigation.

- Continues to challenge the authority for alleged wrongdoing without any cogent basis for doing so.
- Is pursuing a relatively trivial or highly personalised matter of little if any benefit to the wider public.

24. HMRC argued that it considered the majority of the above scenarios to apply to the request which is the focus of this complaint. It argued that this was particularly pronounced in light of the complainant's past behaviour.

Unreasonable persistence

25. HMRC argued that the disputed request was evidence of unreasonable persistence on behalf of the complainant. In support of this it provided the Commissioner with the following background to the request:

26. It noted, as per the background section above, that in November 2018 the complainant had submitted a request seeking the number of departmental contractors who had been discovered to have used a disguised remuneration tax avoidance scheme whilst engaged by HMRC. HMRC explained that its response had stated that it did not hold comprehensive records for the relevant time period and, on that basis, did not hold the information requested. It explained that analysis of the records which were held had been conducted and that as a result the answer to his questions was nil.

27. HMRC explained that the complainant subsequently complained to the Commissioner who issued a decision notice in December 2019 upholding HMRC's initial response.⁵

28. HMRC argued that it was of note that during this prolonged complaint process, the complainant was provided with full copies of all submissions made to the Commissioner, including extensive explanations of the department's process and records held. HMRC explained that the complainant was also provided with information which, although outside the scope of the initial request, was deemed to be of interest to him. HMRC also noted that throughout this time the complainant continued to submit information requests on this subject.

29. HMRC explained that in September 2020 a vocal critic of the Loan Charge posted on social media:

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616843/fs50822158.pdf>

'Well quite. Indeed I only left HMRC in 2015 and I know for absolute fact they had contractors under loan schemes working for them at that time. They quickly laid them off around then but the truth is v much out there'

30. HMRC explained that the complainant responded in turn:

'A Freedom of Information raised was answered by HMRC denying that they had used contractors that used schemes. Escalated to the Information Commissioners Office and [name redacted] Head of FOI team at @HMRCgovuk continued to lie.'

31. HMRC explained that in the following days the complainant began submitting a series of information requests for copies of emails sent and received by senior officials on the subject of the Loan Charge. This series of requests culminated in the request which is the focus of this complaint.⁶

32. HMRC explained that in October 2020, it disclosed under FOIA that in November 2019 it had identified, as a result of new analysis of data not previously available, a number of departmental contractors who had used disguised remuneration tax avoidance schemes. This discovery was made using compliance data not available to HMRC at the time of the complainant's request in November 2018.

33. HMRC explained that shortly after this disclosure the complainant submitted a new request for associated information held by HMRC prior to November 2019. HMRC argued that request was equivalent to that made in December 2018 and contested that the recent disclosures contradicted the position taken by the department when the issue was considered by the Commissioner. HMRC noted that its internal review stated:

'The Freedom of Information Act provides public access to recorded information. The information provided to you in December 2018 was an accurate representation of information available at that time in the same way that the information recently disclosed is an accurate representation of information now available'

⁶ HMRC identified to the Commissioner seven such requests dating from 8 September 2020 to 21 December 2020. In response to some requests information was disclosed with redactions on the basis of section 40(2) (personal data) and some requests were refused on the basis of section 12 (cost) or section 14 of FOIA.

34. HMRC explained that in his subsequent requests for copies of emails of senior officials the complainant stated that:

'The request for the emails not containing the word RCDTS [Revenue and Customs Digital Technology Services, a company wholly owned by HMRC to deliver its IT services] is to find evidence that HMRC were engaging contractors using DR schemes prior to November 2019 and the senior management were aware of that fact.'

35. And:

'These requests are not vexatious but are helping to reveal inconsistencies in the way HMRC are operating. A clear example of this is the request FOI2020/01810 which helped confirm that HMRC had for more than two years hidden the fact that they themselves had engaged contract staff using disguised remuneration schemes.'

36. HMRC explained that, recognising the public interest in this subject, in April 2021 it published the report 'Tax compliance of HMRC suppliers'.⁷ HMRC noted that this report provides a full explanation of how HMRC assures the tax compliance of its contractors, details of those who have been identified as using a disguised remuneration tax avoidance scheme and a timeline of when this information was known to HMRC.
37. HMRC argued that based on the complainant's comments, and taking into account the vast volume of information already disclosed on this subject, HMRC considers the complainant to be attempting to reopen an issue which has already been comprehensively addressed and has been subjected to independent scrutiny by the Commissioner. HMRC noted that the complainant had the opportunity to escalate this issue further at the time, ie to appeal the decision notice issued in December 2019, but chose to not so.
38. In support of this position HMRC cited the judgment of *Betts vs ICO* (EA/2007/0109 19 May 2008) where the majority Tribunal found section 14 was engaged and commented:

'the Appellant's refusal to let the matter drop and the dogged persistence with which he pursued his requests, despite disclosure by the council and explanations as to its practices, indicated that the latter part of the request was part of an obsession. The Tribunal accepted that in early 2005 the Appellant could not be criticised for seeking the information that he did. Two years on, however, and the public interest

⁷ <https://www.gov.uk/government/publications/tax-compliance-of-hmrc-suppliers>

in openness had been outweighed by the drain on resources and diversion from necessary public functions that were a result of his repeated requests...' (paragraph 38)

Scattergun approach

39. HMRC emphasised that as set out above, in its view the complainant had continued to make requests in an attempt to demonstrate that HMRC's submissions to the Commissioner on this matter were incorrect. This has been done by submitting information requests for the emails of senior officials containing the terms 'disguised remuneration' or 'Loan Charge'. HMRC considered that these requests are designed for the purpose of 'fishing' for information without any idea of what might be revealed.
40. HMRC argued that the search terms provided are not specific to the complainant's line of enquiry, ie to determine that previous representations to the Commissioner has been incorrect, and as such are not directed to obtain specific information. HMRC noted that such requests are often called 'fishing expeditions' because the requester casts their net widely in the hope that this will catch information that is noteworthy or otherwise useful to them. It argued that this was very much the case with the requests of the complainant, despite HMRC disclosing information in response to two requests, no information relevant to his line of enquiry has been identified and further requests continue to be received.
41. HMRC noted that whilst fishing for information is not, in itself, enough to make a request vexatious, the Commissioner's guidance provides that some requests may:
 - Impose a burden by obliging the authority to sift through a substantial volume of information to isolate and extract the relevant details;
 - Encompass information which is only of limited value because of the wide scope of the request;
 - Create a burden by requiring the authority to spend a considerable amount of time considering any exemptions and redactions;
 - Be part of a pattern of persistent fishing expeditions by the same requester.
42. Whilst the Commissioner's guidance provided that if the request has any of these characteristics then the authority may take this into consideration when weighing the impact of that request against its purpose and value.

Whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress

43. HMRC argued that a request which would not normally be regarded as vexatious in isolation may assume that quality once considered in context. An example of this would be where an individual is placing a significant strain on an authority's resources by submitting a long and frequent series of requests, and the most recent request, although not obviously vexatious in itself, is contributing to that aggregated burden.
44. It emphasised that the requester's past pattern of behaviour may also be a relevant consideration. For instance, if the authority's experience of dealing with his previous requests suggests that he would not be satisfied with any response and will submit numerous follow up enquiries no matter what information is supplied, then this evidence could strengthen any argument that responding to the current request will impose a disproportionate burden on the authority.

Burden on the authority

45. In this circumstances of this case, HMRC explained that the complainant made 6 requests for the emails of senior officials between 8 September and 21 December 2020. Of these, two requests resulted in disclosure of the requested information, one request was refused by virtue of section 12(2)⁸ of FOIA and three, including the request which resulted in this complaint, were considered to be vexatious.
46. More specifically, HMRC explained that the complainant submitted a narrowed request on 5 October 2020 to that refused on the basis of section 12(2), in the following terms:

'Nevertheless, to be more specific, please provide emails to/from Jim Harra and Jon Thompson that contain the words disguised remuneration. This limits the search to two mailboxes.'

47. HMRC explained that whilst the request was considered to exhibit the scattergun approach, it was determined that to comply with the request would not pose a burden upon the department and four email chains were disclosed in response.
48. It explained that on 3 November 2020, the complainant submitted the following request:

'The request was for all emails that contained the words "disguised remuneration" to/from Jim Harra and Jon Thompson.'

⁸ Section 12(2) states that a public authority does not have to confirm or deny whether it holds requested information if to do so would exceed the appropriate cost limit.

Please can you provide all the emails requested and not limit it to those containing the word 'RCDTs' both sent and received emails.'

49. HMRC explained that it conducted appropriate searches for the requested information, determining that in excess of 3,500 emails within scope of the request were held by the department. It noted that an authority cannot claim section 12 of FOIA for the cost and effort associated with considering exemptions or redacting exempt information. Nonetheless, it may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation. HMRC refused the request under section 14(1) of FOIA, explaining that the request was considered to exhibit the 'scattergun approach' associated with a vexatious request and would create a burden by requiring HMRC to spend an inordinate amount of time considering any exemptions and redactions.
50. On 5 November 2020 the complainant submitted a follow up request in the following terms:

'In order to limit the scope such that it conforms to ICO guidance then can the request look at only emails between Jim Harra and Ruth Stanier in 2018 that contained the words 'disguised remuneration'
51. HMRC explained that whilst the request was still considered to exhibit the scattergun approach, it was determined that to comply with the request would not pose a burden upon the department and four email chains were disclosed in response.
52. HMRC explained that on 4 December 2020 the complainant submitted a further request in the following terms:

'Please supply a copy of all emails to/from Jim Harra from 30/9/2020 to 4/12/2020 that contain the following phrases "disguised remuneration" "DR-Scheme" or abbreviation such as DR "Loan Charge" or abbreviation such as LC'
53. HMRC explained that it conducted appropriate searches for the requested information, determining that in excess of 1,000 emails within scope of the request were held by the department. HMRC refused the request under section 14(1) of FOIA, again explaining that the request was considered to exhibit the 'scattergun approach' associated with a vexatious request and would create a burden by requiring HMRC to spend an inordinate amount of time considering any exemptions and redactions.
54. On 21 December 2020, the complainant submitted a follow up request in the following terms:

'In order to limit the number of emails, please provide emails only between Jim Harra and Mary Aiston that contain the phrases defined above.'

55. HMRC explained that it located some information within the scope of the request, but in this instance, its experience of dealing with the complainant's previous requests suggested that he would not be satisfied with any response and would submit numerous follow up enquiries no matter what information was supplied. HMRC noted the Commissioner's guidance provides that evidence of such behaviour could strengthen any argument that responding to the current request will impose a disproportionate burden on the authority. The request was therefore refused on the basis of section 14(1) of FOIA and it explained that the department was considering the aggregated burden of compliance with the complainant's series of requests.
56. HMRC argued that the emphasis on the context and history of unreasonable requests was acknowledged by the Tribunal in the case of *Hossack v Information Commissioner & Dept for Work and Pensions* (EA/2007/0024 18 December 2007) where the unanimous Tribunal found section 14 was engaged and commented:

'That raises the question of how far the request must be considered in its own terms, and how far it can be considered in context. On its own, there is nothing in the wording or nature of the request to suggest it could be vexatious. But there is no reason to restrict consideration to what appears on the face of the request, and it would be artificial to do so. Clearly, context and history are important.' (paragraph 12)

Wider burden on the authority

57. HMRC explained that in the period 1 October 2020 to 31 May 2021 it had received over 150 FOIA requests relating to disguised remuneration and that this represents over 5% of all requests received across the department. It noted that over half of these requests were made by just 10 individuals with the majority of requests using similar or identical wording.
58. Of the 150 plus requests received, HMRC explained that 44 have sought copies of emails sent or received by senior officials using similar terms to that of the complainant. These requests have resulted in the disclosure of over 1,500 pages of emails and associated attachments. Information within the scope of these requests have been considered with reference to the following FOIA exemptions: 31(1)(a), 31(1)(d) (law enforcement), 35(1)(a) (formulation or development of government policy), 40(2) (personal data), 42(1) (legal professional privilege), 44(1)(a) (statutory prohibition), 36(2)(b)(i) and 36(2)(b)(ii) (effective conduct of public affairs).

59. HMRC explained that due to the scattergun approach of such requests, a large amount of information which is not directly connected to the subject matter incidentally falls within the scope of the requests.
60. For this reason, HMRC explained consideration of any possibly exempt information has required consultation with a large number of officials across the department and wider government.
61. Furthermore, HMRC explained that where information is directly associated to disguised remuneration, the complex nature of the matter has required the involvement of a large number of policy officials who have subsequently moved to work on new policies, posing an unreasonable burden upon departmental resources.
62. HMRC also noted that a large number of these requests use similar or identical wording and it was concerned that several different requesters are acting in concert as part of a campaign to disrupt the organisation by virtue of the sheer weight of FOIA requests being submitted using the Whatdotheyknow.com platform.
63. HMRC explained that of particular relevance to this complaint was one requester, who the Commissioner has referred to as complaint Z. HMRC explained that it had noted the numerous similarities between the requests by the two applicants and with complainant Z's requests frequently referring to those made by the complainant. HMRC noted that similarities include identical request titles and formats as well as language used, and complaints raised. In support of this point, HMRC highlighted the following examples to the Commissioner:

Example 1 – Complainant's request of 4 December 2020 – Request title: *'Emails To/From Jim Harra containing key phrases'*

Request: *'Please supply a copy of all emails to/from Jim Harra from 30/9/2020 to 4/12/2020 that contain the following phrases "disguised remuneration"*

*"DR-Scheme" or abbreviation such as DR
"Loan Charge" or abbreviation such as LC.'*

Complaint Z's request of 21 January 2021 – Request title *'Emails To/From Mary Aiston Containing key phrase - Disguised Remuneration'*

Request: *'Please supply any emails to/from Mary Aiston that include the term 'disguised remuneration' for the calendar month of January 2019. This should also provide emails where DR has been used as an abbreviation.'*

Example 2 – Complainant's request of 21 April 2021 – Request title *'Meta Request for FOI - HMRC Ref FOI2020/03221 raise 4/12/2020'*

Request: *'Thank you for the information, but related to request FOI2020/03221 were FOI2020/03893 IR2021/01389 These were follow on references for the same FOI request and I would have expected the meta request to include these which were all part of the same initial request*

Please can you provide all the data associated with the initial FOI request FOI2020/03221 including the exchanges for which you allocated different reference numbers'

Complainant Z's request of 21 May 2021 – Request title *'Meta request for HMRC Ref FOI2021/00404'*

Request: *'This FOI request is a meta request to cover all communications/correspondence regarding the following FOI request reference: FOI2021/00404*

It should include FOI2021 00404 as well as the exchanges linked to the original request

FOI2021/01003

IR2021/02482'

Example 3 – Complainant's request of 21 January 2021 - Request title *'Emails To/From Jim Harra containing key phrases - a Freedom of Information request to HM Revenue and Customs – WhatDoTheyKnow'*

Request: *'I have only raised two FOI requests for emails and only four in total this year. It is HMRC's refusal to respond to them that has resulted in there being a number of exchanges to satisfy the two original requests.'*

Complainant Z's request of 17 April 2021 Request title *'Correspondence To/From Beth Russell, Director General Tax and Welfare on the Loan Charge - a Freedom of Information request to Her Majesty's Treasury – WhatDoTheyKnow'*

Request: *'I have only made a single request for this information to HMT and indeed only a single request ever to HMT.'*

Example 4 Complainant's request - 26 March 2021 Request title: *'Emails To/From Jim Harra containing key phrases - a Freedom of Information request to HM Revenue and Customs – WhatDoTheyKnow'*

Request: *'I find it difficult to believe that Jim Harra sent/received more than 600 emails in the 65 days (47 working days) between 30/9/2020 and 4/12/2020. That is 13 emails on the subject every day in that period. Please confirm that the more than 600 emails on this subject in the time period specified is correct.'*

Complainant Z's request 17 April 2021 – Request title *'Correspondence To/From Beth Russell, Director General Tax and Welfare on the Loan*

Charge - a Freedom of Information request to Her Majesty's Treasury - WhatDoTheyKnow'

Request: 'This means that Beth Russel sent or received on average more than 7 emails a day on the subject. This seems an extraordinary number on one subject. It might be useful to define what is meant by the word "potentially". An email contains the words specified (Loan Charge) or it doesn't. This is a binary option and a simple search of emails would clearly reveal an exact number. Please provide the exact number (not potential) of emails that contain the specified term (Loan Charge) in each of the specified months.

1/1/2020 to 31/1/2020

1/2/2020 to 28/2/2020

1/3/2020 to 31/3/2020

It may be that the potential number of emails on this analysis yields an actual number that could be responded to in this FOI request.'

64. HMRC further explained that it received a further request from a separate applicant in the following terms on 19 July 2021:

'Please supply a copy of all emails between Jim Harra and Mary Aiston that conform to the following criteria

Period :- 30/9/2020 to 4/12/2020 contain one or more of the following phrases or abbreviations :-

*"disguised remuneration" "DR-Scheme" or abbreviation such as DR
"Loan Charge" or abbreviation such as LC'*

65. HMRC explained that upon receipt it was noted that this request used the exact same criteria as that submitted by the complainant in the request resulting in the complaint which is the subject of this decision notice. HMRC explained that it was also noted that the applicant had created their Whatdotheyknow.com account that same day and had not made any information requests previously.
66. HMRC explained that despite the relevance of the requested time period being only that it conformed to the date on which the complainant made his initial request, it did not feel able to evidence the individuals to be working in concert or the applicant to indeed be the complainant utilising a pseudonym. It therefore complied with the request, disclosing the information in scope.
67. It explained that on the same day the response was sent, a follow up request using the same criteria but for the year prior was received.
68. HMRC accepted that these individuals may not be acting in concert and that this may be a case of applicants with similar interests to those of the complainant using published requests as the basis for their own. Nevertheless, it explained that it considered this to be a relevant factor

when determining the wider burden upon the department resulting from these requests and that whether intentional or not, the complainant forms part of a concerted campaign to disrupt the department's activities.

69. HMRC cited the case of *Dr Gary Duke vs ICO and the University of Salford*, (EA/2011/0060, 26 July 2011) which concerned a case where the appellant had made 13 requests for information to the university in November 2009 following his dismissal from the post of part time lecturer. HMRC noted that the University had seen a significant increase in the rate and number of requests being received in the period from October 2009 to February 2010 and noted that these were similar in subject matter to the appellant's requests. It had also observed that these originated from a comparatively small number of individuals who it believed to have connections to Dr Duke. The University therefore refused Dr Duke's requests as vexatious on the grounds that they were part of a deliberate campaign to disrupt the institution's activities.
70. HMRC noted that the Tribunal unanimously rejected Dr Duke's appeal, commenting that:

'The Tribunal had no difficulty in concluding that the Appellant had, together with others, mounted a campaign in the stream of requests for information that amounted to an abuse of the process. Those requests originated from a comparatively small number of individuals and the Tribunal finds that the University and the ICO were correct to conclude that the requesters had connections with the Appellant who was a former member of staff who had recently been dismissed. It is a fair characterisation that this was a concerted attempt to disrupt the University's activities by a group of activists undertaking a campaign.' (paragraphs 47 and 50).

Volume of requests harassing to a member of staff

71. HMRC argued that the requests of the complainant and those similarly worded are directed at specified senior officials, the email records of which can only be accessed by a small number of private office staff. It explained that due to the niche subject area to which the complainant's line of enquiry is directed, the coordination of any disclosure or any possible redactions also falls to a small number of multi-disciplinary staff with the expertise necessary to review information in scope of these requests.
72. In relation to this point, HMRC cited the Tribunal case *Dadswell vs ICO*, (EA/2012/0033 29 May 2012) in which the Tribunal struck out the complainant's appeal, commenting that:

"...A single request comprising 122 separate questions – 93 of which

were aimed at one named member of staff and 29 of which were directed at another named member of staff – inevitably creates a significant burden in terms of expense and distraction and raises issues in relation to be vexatious...” (paragraph 18).

“...anyone being required to answer a series of 93 questions of an interrogatory nature is likely to feel harassed by the sheer volume of what is requested...The Appellant may not like being characterised as vexatious but that has been the effect of the way in which he has sought information from the Metropolitan District Council...” (paragraphs 20 and 21).

73. HMRC argued that in its view that the aggregated response to the complainant's series of requests is similar to that in the above judgment. This is because the requests in question placed a disproportionate resource burden on the department and diverted staff from other matters. The requests were disruptive and successive with the effect of frustrating and unduly harassing HMRC officers.
74. It argued that this harassing effect is not specific to those staff members tasked with responding to information requests but would likely have a similar effect on those senior officials whose emails were being requested. HMRC emphasised that it is of note that the complainant's request sought copies of emails sent and received up to the date which the request was received. It is clear that any public official who is aware that any communication they send could be placed into the public domain the very next day would be unduly impeded in their duties. A continuation of such requests for any period of time would likely lead to an adverse effect on the public authority's ability to offer an effective public service.

Considering whether the purpose and value justifies the impact on the public authority

75. HMRC suggested that serious purpose and value will often be the strongest argument in favour of the requester when a public authority is deliberating whether to refuse a request on the basis of section 14(1).
76. HMRC noted that the key question to consider is whether the purpose and value of the request provides sufficient grounds to justify the distress, disruption or irritation that would be incurred by complying with that request. This should be judged as objectively as possible. In other words, would a reasonable person think that the purpose and value are enough to justify the impact on the authority.
77. HMRC noted that although section 14(1) is not subject to a traditional public interest test it was confirmed by the Upper Tribunal in the Dransfield case that it may be appropriate to ask the question: 'Does the

request have a value or serious purpose in terms of the objective public interest in the information sought?

78. In the circumstances of this case, HMRC argued that in its view the complainant's series of requests have a very limited purpose or value. It noted that by his own admission, the complainant is making these wide-ranging requests with the hope of capturing some information to support his unfounded allegations that HMRC deliberately withheld information from him.
79. HMRC argued that this was the very definition of a fishing request. In addition to this it argued that the complainant's requests demonstrate an unreasonable persistence, submitting frequent and overlapping requests in order to reopen an issue which has already been considered by the Commissioner, ie in the decision notice cited above.
80. It explained that the information requested in November 2018, whilst not available at the time, has subsequently been disclosed and HMRC has published a report on the matter. HMRC argued that information disclosed to the complainant as result of previous requests had been misrepresented by him in order to justify submitting further requests whilst making completely unsubstantiated accusations against the department and named employees.
81. HMRC further argued that it had demonstrated that compliance with the complainant's requests would pose an unreasonable burden upon the department and is having an adverse effect upon the staff involved with responding to these requests. Despite concerns that the complainant may be acting in concert with others in an attempt to disrupt the activities of the organisation, the department has continued to consider the requests objectively and transparently, disclosing information where possible, eg in the two requests referred to in paragraph 45.
82. Finally, HMRC argued that its position could be summarised in the same way as in *Betts vs ICO* (EA/2007/0109 19 May 2008):

'There was nothing vexatious in the content of the request itself. However, there had been a dispute between the council and the requester which had resulted in ongoing FOIA requests and persistent correspondence over two years. These continued despite the council's disclosures and explanations. Although the latest request was not vexatious in isolation, the Tribunal considered that it was vexatious when viewed in context. It was a continuation of a pattern of behaviour and part of an ongoing campaign to pressure the council. The request on its own may have been simple, but experience showed it was very likely to lead to further correspondence, requests and complaints. Given the wider context and history, the request was harassing, likely to impose a significant burden, and obsessive.'

The Commissioner's position

83. Before considering the submissions of both parties, it is important for the Commissioner to clarify that when determining whether section 14(1) applies, he can only take into account evidence dating from before the request and evidence from up to 20 working days after the request, ie the statutory time for compliance with a request. This is confirmed in the Commissioner's guidance on section 14(1) at paragraphs 130 to 132. The cut off point for any relevant evidence in relation to this complaint is therefore 21 January 2021, ie 20 working days after the date of the disputed request. This is a key point because in this case some of the evidence and submissions HMRC made to the Commissioner post date this period and therefore he cannot take such evidence into account as part of his assessment of section 14(1).
84. Such evidence includes the publication of HMRC's report into this issue in April 2021, the burden placed on HMRC after 21 January 2021 by requests submitted to it on this topic by other requesters and examples 2 to 4 of the 'similar' requests.
85. With regard to assessing the purpose and value of the disputed request, the Commissioner's understanding is that the complainant's wish to be provided with the requested information stems from HMRC's handling of his request of November 2018 to which it explained that it did not hold information about contractors using loan charge schemes. However, subsequent disclosures of information by HMRC in October 2020, using data not previously available, clarified this position.
86. The Commissioner notes HMRC's point that the complainant had the opportunity to appeal the decision notice issued in December 2019 but chose not to. However, the Commissioner's understanding is that the complainant's disputed request is not an attempt to challenge directly the 'not held' finding of the decision notice, but rather to understand, as noted, the shift in HMRC's position from the request of November 2018, to the subsequent clarified position in October 2020. The Commissioner accepts that in this context it is understandable why the complainant may want clarification on this change of position. Consequently, to some extent the Commissioner accepts that there is a purpose and value to the complainant seeking information on this subject.
87. Furthermore, the Commissioner appreciates that as HMRC had refused a number of the complainant's requests on the basis of section 12 and section 14, it does seem reasonable that the complainant would want to refine his request to a point that it was reasonable.
88. Nevertheless, the Commissioner does accept HMRC's position that assessing the purpose and value also requires the broader context to be considered. As per the complainant's tweet, his position appears to be

(in part) that HMRC deliberately lied to him in response to his original request. Rather, the Commissioner's understanding is that different answers were provided on the basis that more data had become available.

89. Moreover, the Commissioner also acknowledges that at the point the disputed request was submitted, HMRC had now disclosed the data originally sought by the November 2018 request, and to that extent one could consider that matter closed or concluded. Furthermore, the Commissioner accepts that HMRC had responded to two of the complainant's emails since September 2020 resulting in the disclosure of some email chains. This only led to the complainant submitting further similar requests and to that extent the Commissioner accepts that the specific purpose and value is perhaps open to question. In other words, as HMRC has argued, that the request has some elements of a fishing request. That is to say, not content with the information initially received the complainant made further requests to find relevant information, albeit with no specific idea of knowing what information would be held beyond *potentially* senior managers' knowledge of DR matters at a certain point in time.
90. The Commissioner notes the complainant's point that these requests are targeted and specific; they do seek information from named individuals, during specific time periods on certain topics. Nevertheless, taking the above into account, the Commissioner is sympathetic to HMRC's assessment that these are fishing for information, information which the complainant does not know whether HMRC will hold or not. In other words, aiming to locate information or correspondence that senior managers may have exchanged on this topic. Ultimately, the Commissioner accepts that there is a speculative element to the series of requests including the disputed request which is at the focus of this notice.
91. In summary, whilst the Commissioner accepts that there is on one level a serious purpose to this request, this has to be seen in the context of the complainant's previous requests, and in particular HMRC's clarification in October 2020 of its position in relation to contractors using DR schemes. When seen through this prism, in the Commissioner's view the legitimate purpose and value of the complainant's dispute arguably starts to decline. In reaching this decision he also accepts HMRC's point that the evidence would suggest that the complainant would be unlikely to be satisfied with the information provided in response to the request and would therefore submit further similar requests. In the Commissioner's view this also calls into question the purpose and value of the disputed request.
92. Turning to the burden in complying with the request, the Commissioner notes that complying with this in isolation would not place an undue

burden on HMRC. However, HMRC argued that complying with this request when taking into account the other requests it had received from the complainant became so.

93. The Commissioner notes from HMRC's submissions that the complainant submitted six requests in the three and half month period prior to the request. On the face of it the Commissioner does not consider that this represents a particularly significant burden on a department the size of HMRC. However, he acknowledges that the niche subject matter means that a relatively small amount of individuals will have been involved in handling and processing these requests. The Commissioner also accepts that whilst only two of these requests were responded to, HMRC clearly had to undertake some work in order to consider these requests objectively and then refuse them. So whilst there is some burden in considering the complainant's requests of September 2020 to December 2020, this is arguably not an overwhelming one.
94. Nevertheless, the Commissioner accepts that it is appropriate for HMRC to consider the burden likely to be placed on it by the complainant if it fulfilled this request. As discussed above, the Commissioner agrees with HMRC that based on the complainant's pattern of requests, further similar requests are very likely to be submitted to it, thus placing an additional burden on HMRC in dealing with those similar requests from the complainant.
95. Moreover, the Commissioner also accepts that the processing of the complainant's disputed request should be seen in the context of the other focussed requests that HMRC had received on this subject up to 21 January 2021. The Commissioner accepts that up to that point HMRC had received a significant number of requests (from individuals other than the complainant) on this subject matter and that dealing with these requests placed a considerable demand on HMRC's resources. The Commissioner also accepts that there appears to be evidence of some form of campaign, even if this is an informal one rather than a co-ordinated one, against HMRC in relation to this subject which involves the submission of significant numbers of FOIA requests to it. In the Commissioner's view, 'example 1' supports this point. In any event, even if there was no such co-ordinated campaign, even an informal one, then the Commissioner still accepts that dealing with the complainant's request on top of the others it had received on this subject will have added to HMRC's burden.
96. The Commissioner also thinks that there is validity to HMRC's point about the impact that such targeted requests have on individuals. As HMRC noted, the request effectively asks for 'real time' information and he accepts that those individuals who are the subject of such requests are likely to feel at the very least constrained, or potentially harassed, if they know that an email they sent on a particular subject is very likely

to the subject of one or a series of FOI requests in the very near future. In making this point the Commissioner wishes to emphasise that all employees of public authorities should of course be aware that emails they send could be requested under FOIA. Moreover, senior officials in particular should be prepared to accept certain challenge to decisions that they make. However, the series of requests sent by the complainant specifically and routinely target recent emails sent by/to particular individuals. Therefore, whilst it may not have been the complainant's intention to harass the individuals in question the Commissioner accepts that the requests clearly have – at the very least – the potential to do so.

97. In conclusion, the Commissioner considers this to be a finely balanced case. He accepts that at the point the disputed request was submitted there was some legitimate purpose and value to it, albeit for the reasons set out above he considers the purpose and value to be arguably limited. However, the Commissioner is just persuaded that this is outweighed by the impact that answering this request would have on HMRC, both in the context of the complainant's recent requests to it, the wider context of very similar requests being submitted to it and the likelihood of the complainant submitting further similarly targeted requests to it.
98. Although not part of his formal decision, the Commissioner would add that HMRC's case for applying section 14(1) would be significantly stronger if the evidence that post dates 21 January 2021 was taken into account.

Right of appeal

99. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

100. 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.

101. 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

Jonathan Slee
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Information Commissioner's Office
Wycliffe House
Water Lane
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