

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2023

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

Decision (including any steps ordered)

1. The complainant requested information with regards to Research and development (R&D) tax credit claims. HM Revenue and Customs (HMRC) refused to provide the information under section 31(1)(d) (prejudice to tax collection) of the FOIA as it determined that releasing the information would prejudice the assessment and payment of tax credits.
2. The Commissioner's decision is that section 31(1)(d) of the FOIA is engaged and the public interest test favours maintaining the exemption.
3. The Commissioner does not require any steps.

Request and response

4. On 6 January 2022 the complainant made the following information request:

“The number of enquiries or investigations (whichever term HMRC uses) that have been opened into R&D tax credit claims.

I would like this data as a total for each of the last five years, with December 31 as year-end. If this is not possible then please use the year-end used internally by the organisation.

If you are unable to provide five years of data, please provide four years of data, if you are unable to provide four years of data, please provide three years of data, otherwise please provide data for the last two years”

5. HMRC responded on the 13 January 2022 refusing the request under section 31(1)(d) of the FOIA as it determined that releasing the information would prejudice the assessment and payment of tax credits.
6. The complainant requested an internal review on 24 January 2022 and HMRC provided its internal review outcome on 3 March 2022 upholding its initial response.

Scope of the case

7. The complainant contacted the Commissioner on 6 April 2022 to complain about HMRC refusing the request.
8. The scope of the case is to determine whether section 31(1)(d) of the FOIA was applied correctly.

Reasons for decision

Section 31(1)(d) of the FOIA – the assessment or collection of any tax or duty or any imposition of a similar nature.

9. Section 31 of the FOIA creates an exemption from the duty to disclose if releasing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
10. Section 31(1)(d) states:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice-

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature.”
11. The Commissioner’s guidance¹ on section 31(1)(d) of the FOIA states that the phrase “tax, duty or...imposition of a similar nature” is a very broad term. This exemption may protect information if its disclosure would or would be likely to prejudice the collection of tax from a particular person, or be of use to those evading tax. It may also apply if disclosing the information would or would be likely to promote tax avoidance.
12. HMRC has explained that companies can claim Research & Development (R&D) tax relief for qualifying activities which will either reduce their tax bill or result in payable tax credit.
13. Its position is that having a payable credit system means that HMRC must protect against any risk of abuse or fraud and disclosing the requested information could assist those seeking to abuse R&D tax relief.
14. HMRC has advised that it has experienced recent criminal attacks on the R&D tax credit scheme, using knowledge linked to perceived weaknesses in the level of coverage policing the scheme.

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

15. It states that from experience, releasing any data risks prejudicing future tax collection because its data can then be used to assess the risk of getting caught, and then estimate more effectively how successful HMRC is in locating such activity and tackling the resultant non-compliance. HMRC believe that this may undermine the deterrent effect of its compliance work and may in turn lead to more unlawful activity.
16. The Commissioner accepts HMRC's position that disclosing the requested information could reasonably give or be useful to, anyone looking to abuse the scheme. It would give insight into HMRC's policing of the R&D tax relief, which could result in less tax being lawfully due than would otherwise be the case.
17. The Commissioner therefore concludes that disclosure of the requested information would be likely to result in prejudice relevant to section 31(1)(d) of the FOIA and therefore that this exemption is engaged.

Public interest test

18. The exemption at section 31(1)(d) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner has also considered whether in all the circumstances of this case, the public interest in maintaining the exemption at section 31(1)(d) outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosure

19. HMRC acknowledges the general public interest in ensuring that public authorities are as transparent as possible about their activities, promoting accountability and public understanding of actions being taken.
20. It also recognised that publishing the requested information in this case may reassure the public that its compliance activities are fair and robust and applied fairly.
21. The complainant considers his request is too broad and too general in nature to be used to prejudice any particular inquiries and would not reveal any details on how the inquiries are operated, only how many there have been.
22. The complainant also argued that HMRC reveal the aggregate number of inquiries conducted under section 19 of the Tax Credits Act 2002 into

awards of tax credits for 2019/20², which he says clearly demonstrates that HMRC does not consider the aggregate number of all tax inquiries to prejudice individual inquiries.

Public interest arguments for maintaining the exemption

23. HMRC has explained to the Commissioner that the 2019/20 tax credits referred to by the complainant, above, relate to Personal Tax Credits, rather than R&D tax credit. HMRC states that its responses to requests under the FOIA are based on the individual circumstances within each regime it administers.
24. HMRC has stated R&D tax relief via the available schemes supports companies across several sectors and industries, both well-established and those starting up in areas of scientific and/or technological advancement. By its very nature R&D activity attracts those willing to take a risk and stretch boundaries. Disclosing the information requested carries the risk of facilitating or encouraging those so inclined to do so to risk stretching boundaries for personal gain beyond what is intended by the spirit and letter of the legislation.
25. It also argued that putting HMRC's compliance activities at risk could also undermine public confidence in the tax system and this could damage the general climate of honesty among the overwhelming majority of claimants who use the system properly. It believed that this outcome would not be in the public interest.

Balance of the public interest

26. The Commissioner has considered the above and finds that in all circumstances of the case the public interest in not revealing the information outweighs the public interest in disclosure. He is in no way dismissive of the public interest in disclosing this information in the interests of transparency and accountability. However, in the circumstances, the Commissioner's view is that there is a significant public interest in withholding the information.
27. He has therefore concluded that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. HMRC was not, therefore, obliged to disclose this information.

² [2019 to 2020 annual report from the Commissioners for Revenue and Customs to the Treasury on tax credits - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428222/2019-2020-annual-report-from-the-commissioners-for-revenue-and-customs-to-the-treasury-on-tax-credits.pdf)

Right of appeal

28. 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

29. 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.
30. 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

Ben Tomes
Group Manager
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Wycliffe House
Water Lane
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Cheshire
SK9 5AF