

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to Loan Charge from His Majesty's Revenue and Customs ("HMRC"). HMRC provided some of the information and withheld the remainder under section 31(1)(d) of FOIA (prejudice to the assessment or collection of tax) and section 42 of FOIA (legal professional privilege).
2. The Commissioner's decision is that HMRC was entitled to rely on section 31(1)(d) and section 42 of FOIA to refuse the request. No steps are required.

Request and response

3. On 26 October 2021, the complainant submitted an information request to which HMRC provided a response on 10 November 2021. Following this the complainant wrote again to HMRC querying an odd pattern in the information disclosed and also requested additional information. HMRC treated this correspondence as a new request, which is the focus of this complaint.
4. In their correspondence of 10 November 2021, the complainant requested information in the following terms:

"Thank you for your response.

1) I would ask that you check the results as the pattern of sending and receiving is very peculiar. The supplied breakdown shows that

this individual appears to have been sending literally hundreds of emails on the target subjects each month from January through to August, eight months without receiving a response. After August there appears to be a far more normal profile of email activity As an interim:-

- 2) Please provide the 13 emails received in August 2019 with the search term "Loan Charge"
- 3) Please provide the 6 emails received in August 2019 with the search term "LC"
5. HMRC responded on 25 February 2022. It provided some of the information, but withheld the remainder under section 40(2), section 44(1)(a), section 36(2)(b)(i) and (ii), section 36(2)(c) and section 35(1) of FOIA.
6. On 25 February 2022 the complainant wrote to HMRC challenging the number of emails provided as well as the redaction and exemptions applied. HMRC provided its response on 19 April 2022. On 6 May 2022 the complainant requested an internal review, specifically challenging HMRC's reliance on section 35 and 36 of FOIA.
7. HMRC responded on 22 June 2022 maintaining its original position in relation to its reliance on section 35(1)(a) and section 36 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 29 June 2022 to complain about the way their request for information had been handled.
9. During the Commissioner's investigations, HMRC advised on 1 February 2023 that, the public interest arguments to withhold the requested information had changed with the passage of time, and it no longer sought to rely upon those exemptions. Although it disclosed some of the withheld information, it continued to withhold other parts under section 31(1)(d) and section 42 of FOIA.
10. On 9 February 2023, the complainant wrote to the Commissioner, challenging the exemptions now relied on by HMRC.
11. The Commissioner considers that the scope of his investigation is to determine whether HMRC was entitled to rely on section 31(1)(d) and section 42 of FOIA to withhold the remaining information.

Reasons for decision

Section 42(1) Legal professional privilege

12. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and the claim to privilege could be maintained in legal proceedings. It protects confidential communications between a lawyer and client.
13. The Commissioner's guidance¹ on section 42(1) explains that where no litigation is in progress or contemplated, such privilege covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.
14. In this case the complainant has requested information relating to loan charge. In their view HMRC has not released some sections that were originally redacted citing section 35 and have now relied on section 31 and 42 to withhold the information.
15. HMRC have explained that the withheld information contains legal advice provided to decision-makers concerning governmental policies and that to disclose such information would undermine the very rationale underpinning the exemption that is supposed to promote full and frank exchanges between government and its legal advisers.
16. Having considered HMRC's explanation and having viewed the withheld information, the Commissioner is satisfied that the information constitutes confidential communication made for the purpose of seeking or giving legal advice. The exemption provided by section 42(1) of FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

Public interest test

17. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have, that communications will remain confidential, undermines the ability of parties to seek or provide legal advice appropriately and thus erodes the rule of law and the individual rights it guarantees.

18. The Commissioner considers that the balance of public interest lies in withholding the information and protecting HMRC's ability to collate information necessary to give or obtain legal advice without the fear of premature disclosure. Whilst the Commissioner has considered the complainant's public interest arguments, he does not consider that they justify disclosure of such information to the world at large.
19. The Commissioner has concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. Therefore, HMRC has correctly applied section 42(1). The Commissioner requires no further action to be taken by HMRC in relation to this aspect of the request.

Section 31(1)(d) Prejudice to the assessment or collection of tax or any imposition of a similar nature.

20. 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.
21. 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."

22. The Commissioner's guidance² 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

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

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.

23. HMRC has explained that the withheld information could be used by opportunistic individuals to arrange their affairs to rehearse arguments to reduce their tax liability and prejudice their ability to assess and collect tax. It argues that the release of the information is likely to enable individuals to reduce their liability to pay tax.
24. Having considered the withheld information, the Commissioner accepts HMRC's position that disclosing the requested information could reasonably give or be useful to anyone looking to exploit the tax system, which could result in less tax being lawfully due than would otherwise be the case.
25. 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 this exemption is engaged.

Public interest test

26. 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.
27. The Commissioner has considered the arguments presented by HMRC. It recognises the general public interest in promoting transparency, accountability and understanding of its compliance activities. It argues that greater public interest lies in maintaining public confidence in the collection of tax.
28. The Commissioner 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.
29. 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.

Right of appeal

30. 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

Reference: IC-178428-W9S6

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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

**Esi Mensah
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**