

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2023

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

Decision

1. The Commissioner's decision is that HM Revenue & Customs is entitled to withhold some of the requested correspondence between its senior officials about the loan charge policy under section 36(2)(b) of FOIA as disclosing it would be likely to prejudice the effective conduct of public affairs.
2. It is not necessary for HM Revenue & Customs to take any steps.

Background

3. HM Revenue & Customs (HMRC) has provided the following background.
4. The request concerns tax avoidance loan schemes and the loan charge. Loan schemes - otherwise known as 'disguised remuneration' schemes - are used to avoid paying Income Tax and National Insurance. People who use these schemes have their salary paid in loans, instead of being paid in the usual way.
5. Normally, when you're given a loan, you have to pay it back, often with interest added. But these loans are paid to people in such a way that it means it's unlikely that they'll ever have to be repaid. In other words, the person receiving money from a loan scheme gets to keep it all. And they don't pay any tax on this money, even though it's clearly income.
6. It's highly unusual to receive your salary in loans and is clearly a method used to avoid paying tax.

7. The loan charge was announced at Budget 2016. The policy ensures users of tax avoidance loan schemes pay their share of tax and is expected to protect £3.2 billion for the UK's vital public services.
8. In March 2018, the Loan Charge Action Group (LCAG) was formed. The group's website provides that it is a non-profit volunteer run group that actively campaigns against loan charge legislation.
9. In January 2019, the All Party Parliamentary Loan Charge Group (APPG) was established to raise concerns regarding the loan charge policy. At its inaugural meeting, it was agreed to formally appoint LCAG as the Secretariat of the APPG.
10. In September 2019, the Chancellor commissioned Sir Amyas Morse to lead an independent review into the disguised remuneration loan charge. Sir Amyas was asked to consider whether the policy was an appropriate response to the tax avoidance behaviour in question, and whether the changes the government had announced to support individuals to meet their tax liabilities had addressed any legitimate concerns raised.
11. In December 2020 HMRC published its report on actions it has taken to implement all of the nineteen accepted recommendations of the Independent Loan Charge Review.
12. On 21 October 2021, LCAG sent the letter 'The Loan Charge review in light of evidence not known at the time' to Lord Morse.

Request and response

13. The complainant made the following information request to HMRC on 4 November 2021:

"Please provide all sent and all received emails - including email attachments - containing the search terms 'Morse' and/or 'Amyas' and/or 'LCAG' and/or 'Loan Charge Action Group' between the period 21 October 2021 to 04 November 2021 inclusive (which equates to a period of eleven working days) from the mailboxes of the following senior HMRC officials:

Jim Harra - First Permanent Secretary and Chief Executive

Angela MacDonald - Deputy Chief Executive and Second Permanent Secretary

Penny Ciniwicz - Director General Customer Compliance

Alan Evans - General Counsel and Solicitor

Mary Aiston - Director Counter Avoidance

Jonathan Athow - Director General Customer Strategy and Tax Design

If the department holds recorded information of any other kind and/or in any other format (including, but not limited to SMS text messages, WhatsApp messages, Signal messages, internal memos, documents etc.), which includes reference(s) to any of the search terms listed above and was received or sent by one or more of the six named individuals between the dates specified, please also disclose and provide this data.”

14. HMRC disclosed relevant information, with personal data redacted under section 40(2) of FOIA. It withheld some information under section 36 and section 44 of FOIA, with the latter concerning prohibitions on disclosure. In their request for an internal review, the complainant disputed HMRC's reliance on section 36 to withhold certain emails. HMRC maintained its reliance on this exemption.

Reasons for decision

15. This reasoning covers HMRC's application of sections 36(2)(b)(i) and (2)(b)(ii) of FOIA to 24 emails within scope of the request. The timeliness of HMRC's internal review response is considered under 'Other Matters'.
16. Under sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA, information is exempt information where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice and the free and frank exchange of views.
17. Information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore a range of options, when providing advice or giving their views as part of the process of deliberation.
18. HMRC has confirmed that the information to which it applied these exemptions can be split in to three categories:
 - The provision of advice to the FST [Financial Secretary to the Treasury] to inform the responses to oral questions scheduled to be asked in the House of Commons, 2 November 2021
 - Readouts from meetings with the FST to inform a meeting between the Minister and HMRC's Chief Executive, scheduled to take place 1 November 2021
 - The consideration of responses to letters received from both the APPG and LCAG which at the time the request was received had not yet been responded to

19. HMRC has confirmed that the Qualified Person (QP) in this case was Jim Harra, First Permanent Secretary and HMRC's Chief Executive. It has noted that the QP identified the two limbs of the exemption that he believed were applicable to the withheld information; he said that disclosure would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views.
20. HMRC has gone on to say that the opinion was made on the basis that disclosing the withheld information was likely to undermine staff confidence in a "safe space" in which candid views could be expressed. It was also considered that disclosure would result in a chilling effect on future discussions by inhibiting the free and frank sharing of opinions, that staff would be less forthcoming, and that their opinions and advice would be tempered or withheld.
21. HMRC considers that the timing of the request was an important consideration to this opinion. The request sought copies of emails sent and received by the department's most senior officials in a two-week period up to the date the request was received. The request effectively asked for 'real time' information on subjects which were ongoing at the time the request was received and responded to.
22. As part of effective government, HMRC says, ministers are provided with briefings ahead of engagements such as Oral Questions. This allows ministers time to consider the views and opinions provided by officials, and to consider, deliberate and question any statements or Q&A provided, and to request further information, support or advice where required.
23. This is by its very nature a free and frank exchange of views drawn together by officials for ministers to deliberate ahead of such engagements. Officials and ministers will often question key points raised, providing different questions and/or responses, before the final draft is agreed, embedded and used.
24. HMRC says it considers there is sensitivity around disclosing information relating to such briefings, particularly when the issues highlighted are 'live' at the time of the information request.
25. Officials, ministers and the department must be able to have a 'safe space' to develop their arguments, evidence and defence.
26. HMRC considers the same level of prejudice to apply to briefings for meetings between the department's Chief Executive and ministers. In the case of the third category of information, the withheld information related to letters which at the time the request was received were still being drafted and had not been finalised at the point the request was responded to.

27. At the time the opinion was provided, the requested time frame covered the date on which LCAG had written to Lord Morse and that at the time of processing the request, a response to this letter had not been received.
28. HMRC considers that the complainant's request had been intended to capture either HMRC comment on this letter or communication between officials and Lord Morse himself. However, the way in which the request was "formed" was not directed to obtain such information. The request was framed speculatively in broad terms such that it would inevitably capture information of no relevance to the complainant's line of enquiry. This is evidenced by the complainant subsequently referring to the information disclosed in response to their request as "(non)information".
29. In their request for an internal review, the complainant said:

"It is undoubted that this letter would have been the subject of internal discussion and debate by those named senior HMRC officials and it is those exchanges which you have determined should be withheld on the basis that it is not in the public interest to disclose. It is my assertion - and one which is clearly shared by those many thousands affected by the Loan Charge - that the use of the public interest exemption does not stand scrutiny when people are actually losing their lives as a direct result of this retrospective policy. Conversely, it would appear that the only -and exclusive - interest being served by your decision to withhold this information is that of those senior HMRC officials, whose waning reputation for honesty and candour remains under firm and sustainable challenge from tax professionals and news commentators across the public domain."
30. HMRC has advised that the withheld information contains only one reference of relevance, merely stating that such a letter has been sent to Lord Morse. All other references to Lord Morse are incidental, referring to the Morse review.
31. HMRC says that the complainant's request is one of many 'fishing expedition' type requests HMRC has received on this subject. HMRC noted that it has previously made the Commissioner aware of its concerns that numerous requesters were acting in concert as part of a campaign to disrupt the department by virtue of the sheer weight of FOIA requests being submitted using the whatdotheyknow.com platform. In the six months prior to the current request being made, HMRC says it had received 80 similarly worded requests seeking the emails of senior officials. HMRC has noted that the Commissioner acknowledged evidence of some form of campaign in [IC-97755-F8G9](#).
32. HMRC also considers 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 any email they sent on a particular subject is very likely to be the subject of one or a series of FOIA requests in the very near future and when the subject matter is still ongoing.

The Commissioner's conclusion

33. The exemptions at section 36(2)(b) can only be engaged on the basis of the reasonable opinion of a qualified person.
34. First, the Commissioner is satisfied that, in this case, Jim Harra as First Permanent Secretary and HMRC's Chief Executive is authorised as QP under section 36(5)(c) of FOIA.
35. HMRC has provided the Commissioner with copies of its submissions to the QP and confirmation of his opinion. These show that the QP's opinion was sought on 8 November 2021 and the opinion was provided on the same day. The submissions show that the QP was provided with copies of the emails which were considered to be exempt under section 36 and reasons why this exemption might apply.
36. From these submissions the Commissioner is also satisfied that the QP gave an opinion and that the opinion was given at the appropriate time; between the date of the request and HMRC's response to it of 25 November 2021. Finally, the Commissioner has considered the reasonableness of the QP's opinion.
37. In relation to section 36 'reasonableness' is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
38. The QP's opinion is that disclosing the withheld information would be likely to undermine the "safe space" in which staff feel comfortable offering advice and views on matters associated with the loan charge policy. The QP also considered that disclosure would be likely to have a "chilling effect" on related discussions. This is particularly since the matter in question was still live at the time of the request.
39. The Commissioner notes that the QP's opinion is that the envisioned prejudice would be likely to happen, rather than would happen. He accepts this level of likelihood as realistic and that there is a more than a hypothetical or remote possibility of prejudice occurring. Based on the submissions provided to the QP the Commissioner is also satisfied that the QP had sufficient appropriate information about the request and the

section 36(2)(b) exemptions to form an opinion on the matter of whether reliance on those exemptions was appropriate.

40. To summarise, the Commissioner accepts that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that HMRC was entitled to rely on section 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA to withhold the information. The Commissioner will go on to consider the public interest test associated with these exemptions.

Public interest test

Public interest in disclosing the information

41. In their request for an internal review, the complainant argued that HMRC's culpability in the loan charge "debacle" had been long-established. They noted a BBC Radio 4 programme 'Money Box' which had been recently broadcast. The programme contained an interview with a tax lawyer who stated, "HMRC should have relied on the Agency Rules of the Employment Income Tax code and it should have collected the Pay As You Earn income tax by those means - ironically, had it done so, it would have collected more tax than by means of the Loan Charge". The lawyer had continued, "What I would urge HMRC and the Treasury to do is to look at this as a financial scandal. It is not a case of deliberate tax avoidance here. We are talking about people who have been mis-sold".
42. The complainant said that to date, and "despite the overwhelming evidence which has been revealed supporting that position", HMRC has continued to "remorselessly persecute and victimise those affected individuals." The complainant considered that the case for meeting the public interest in disclosing the information contained in these 24 emails could not be stronger. As each day passed, the complainant stated, HMRC's refusal to do so only compounded "a plausible suspicion of wrongdoing."
43. The complainant also argued that there was a "huge" public interest in establishing to what lengths the senior officials at HMRC had gone, and the steps they had taken, "in order to try and deny fact and evidence, and distance themselves from this ongoing scandal." The complainant considered releasing this information was essential to help establish the actual reaction and response from those officials, and to clarify their understanding and acceptance (or otherwise) of the legal points and summary challenges raised in the letter to Lord Morse.
44. The complainant went on to argue that

"Given the many thousands of citizens and their families so unjustly affected by the retrospective policy known as the Loan Charge, and

the deep distrust of HMRC which has since formed as a result of their refusal to acknowledge, or act upon the numerous concerns raised by the Loan Charge and Taxpayer Fairness All Party Parliamentary Group in their correspondence and reports, then one could reasonably suggest that the public interest test is served by this fact alone. However, when there is also 'a plausible suspicion of wrongdoing on the part of the public authority' - as in this specific case, and as served, evidenced and proven by the content of the letter to Lord Morse - then one could perhaps be even more assured that any reasonable person would conclude that the public interest test is already clearly met. I feel confident that the hundreds of MPs and peers who remain members of the Loan Charge and Taxpayer Fairness APPG would vehemently agree."

45. Finally, the complainant disputed that the matter was still live. This was because the loan charge policy had been in place since November 2017 and had been subject to implementation decisions, as per the Morse review, in December 2019. Since the Morse report had been published over two years previously they queried what was still being 'deliberated' and what 'views' were being 'inhibited'.
46. In its submission to the Commissioner, HMRC has acknowledged that there is a clear public interest in government departments being as open and transparent as possible, so as to increase accountability and inform public debate. It also accepts that its officials are expected to act with high levels of integrity, impartiality, and objectivity and as such should not be affected by the disclosure of such material.

Public interest in withholding the information

47. HMRC considers that there is a public interest in maintaining its ability to debate issues and reach impartial and appropriate decisions free from external interference and distraction.
48. It says it is also the case that good government depends on good decision-making. This needs to be based on the best advice available and a full consideration of the options and arguments presented to ministers and senior officials. For this to occur, it is essential that officials can provide candid advice on a range of issues without worrying about the public presentation of such advice.
49. HMRC considers that disclosing the information would be likely to remove the space within which officials are able to discuss options freely and frankly. This would limit its ability to develop the delivery of its policies and priorities where required.

50. On balance, HMRC says, it finds the public interest to favour preserving such a safe space and considers that to impact on the operational effectiveness of the department by disclosing information irrelevant to the complainant's line of enquiry is not in the public interest.

Balance of the public interest

51. The Commissioner has found that disclosing the information would be likely to prejudice the effective conduct of public affairs by inhibiting the free and frank provision of advice and by inhibiting the free and frank exchange of views.
52. The Commissioner considers that, contrary to the complainant's view, at the time of their request in November 2021 matters associated with the loan charge policy were still 'live'. HMRC has noted that on 21 October 2021, LCAG had sent the 'Loan Charge review in light of evidence not known at the time' letter to Lord Morse. Communications on the subject were being exchanged up to the date of the request for those communications – HMRC has described the request as being for 'real time' information.
53. The Commissioner has taken account of the complainant's arguments and he appreciates their concerns. He has also taken account of the seniority of the individuals named in the request. However, in respect of the ongoing loan charge matter, in the Commissioner's view there is greater public interest in officials being to advise HMRC and the relevant minister about the loan charge openly, and in officials and ministers being able to discuss the matter with candour. That is particularly so in this case, while the matter was 'live'.
54. The wider public interest in the information is not such, in the Commissioner's view, that it warrants prejudicing the effective conduct of public affairs in this case. He is satisfied that there was greater public interest in HMRC having the space and freedom to make the best decision(s) about the ongoing loan charge matter, without potential inhibition. The Commissioner considers that the information that HMRC has disclosed satisfies the public interest in the subject of the complainant's request to an adequate degree. His decision is therefore that the balance of the public interest favours maintaining the section 36(2)(b)(i) and section 36(2)(b)(ii) exemptions.

Other Matters

55. Provision of an internal review is not a requirement of FOIA but is a matter of good practice. The Commissioner expects an internal review to be provided within 20 working days of a request for one and, in the most complex cases only, in no longer than 40 working days.
56. HMRC responded to the request on 25 November 2021 and on 24 January 2022 the complainant requested an internal review, which HMRC did not provide until 7 April 2022. This was well outside the maximum 40 working day requirement. The Commissioner has recorded this delay for monitoring purposes and reminds HMRC that it should comply with the internal review conditions at section 5 of the [FOIA Code of Practice](#).

Right of appeal

57. 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

58. 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.

59. 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

Cressida Woodall
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